No. [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

JAN A. BATA

Petitioner

v.

THOMAS J. BATA; THOMAS J. BATA and DAVID GRAHAM as Executors of the Estate of Mary T. Bata; and WESTERN INVESTMENT AND TRADING COMPANY LIMITED, a Bermuda Corporation

Respondents

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

Jan A. Bata prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Delaware, entered in the above entitled case on May 4, 1961.

CITATIONS TO OPINIONS AND JUDGMENT BELOW

A. The opinion of the Chancellor of the Court of Chancery for New Castle County, Delaware dated February 14, 1958 is reported in 139 A. 2d 159 and is printed in Appendix A page 1; the order of the Chancellor dated September 15, 1958 concerning claims is unreported and is printed in Appendix A, page 92, the final decree of the Chancellor dated September 26, 1958 is unreported and is printed in Appendix A, page 94.

The opinion of the Supreme Court of the State of Delaware dated August 3, 1960 is reported in 163 A. 2d 493 and is printed in Appendix A, page 103. The opinon of the Supreme Court of the State of Delaware dated April 25, 1961 is unreported and is printed in Appendix A, page 161.

The letter opinion of the Supreme Court of the State of Delaware dated May 1, 1961 is unreported and is printed in Appendix A page 177. The final judgment in the Supreme Court of the State of Delaware dated May 4, 1961 is unreported and is printed in Appendix A, page 180.

B. The orders, certificates, and decree and summary record of proceedings of the Czechoslovakian Probate Court, which is the District Court at Zlin, Czechoslovakia, and the two Czechoslovakian holographic documents of Thomas Bata dated May 10, 1931 and May 19, 1931 referred to in these orders and certificates, and in the opinions of the Court below, are printed in Appendix B in the agreed English translations with notations of their respective exhibit numbers in the record in Delaware.

C. The opinion of the New York Court of Appeals in the New York case between the parties hereto referred to by the Delaware Supreme Court is reported in 306 N. Y. 96, 115 N. E. 2d 672 and is printed in Appendix C, page 1.

The opinions of the New York Courts below are reported in 99 N. Y. S. 2d 535 (Supreme Court) and in 279 App. Div. 182, 108 N. Y. S. 2d 659 (Appellate Division).

The opinion of the Supreme Court of the Netherlands at the Hague in the Dutch case between the parties hereto referred to by the Delaware Supreme Court is printed in the agreed English translation in Appendix C, page 17.

Jurisdiction

The judgment of the Supreme Court of the State of Delaware is dated May 4, 1961, and was entered on May 4, 1961.

Rehearing was denied in the opinion of the Supreme Court of the State of Delaware dated April 25, 1961, Appendix A, page 161.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

Questions Presented

1. The first question is whether the Supreme Court of the State of Delaware was not without jurisdiction, in error, and acting in deprivation of petitioner's rights, including rights under treaties, the constitution of the United States, and authority of the United States, to entertain, adopt, and attempt to effectuate a collateral attack upon the 1932-1933 Czechoslovakian *in rem* probate proceedings, administration, disposition and adjudication, by the Czechoslovakian Court of competent jurisdiction, of the estate of Thomas Bata, in which all parties hereto participated, all parties being then citizens of Czechoslovakia, and Czechoslovakia being a civilized nation state then completely independent and sovereign with which the United States had friendly relations.

This rule, against collateral attack, uniformly followed by this court, was first set forth by Chief Justice Marshall in *Williams* v. *Amroyd*, 11 U.S. (7 Cranch) 423, (1813). Chief Justice Marshall said, at page 432:

> "The sentence of a competent court, proceeding *in rem*, is conclusive with respect to the thing itself, and operates as an absolute change of the property."

Chief Justice Marshall further stated:

> "No Court of coordinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law can never arise, for no coordinate tribunal is capable of making the inquiry."

2. The further questions presented are whether the Supreme Court of Delaware was not in error and acting in deprivation of petitioner's rights, including rights under treaties, the Constitution of the United States, and authority under the United States;

A. to refuse to respect and extend comity also to a decision of the Supreme Court of the Netherlands at The Hague, which sustained and was in harmony with the foregoing Czechoslovakian probate proceedings, and was issued in a Netherlands action brought by the respondents against the petitioner, the Netherlands being a civilized nation state with which the United States had friendly relations, neither petitioner nor respondents being citizens of the Netherlands; and

B. to extend full faith and credit and conclusive effect to a finding of the lower court in the New York case, and to do so notwithstanding the specific limitation of that decision by the Court of Appeals of New York to the shares there in question, and which finding in New York furthermore is irrelevant to the instant case and is in itself a nullity for lack of jurisdiction to make a collateral attack upon the Czechoslovakian *in rem* probate proceedings;

respondents being citizens and residents of Canada and Bermuda, and petitioner being a citizen and resident of Brazil, with which state the United States has treaties of friendship and of status of aliens.

Treaties, Constitutional Provisions, and Authority Under the United States

1. The treaty between the United States and Brazil proclaimed March 18, 1829 was a Treaty of Friendship, Commerce and Navigation. (Treaty Series No. 34). The text of the treaty is in Appendix D page 1. Article 12 of that treaty provides as follows:

"Art. 12th. Both the contracting parties promise and engage formally to give their special protection to the persons and property of the citizens and subjects of each other, of all occupations who may be in their

territories, subject to the jurisdiction of the one or the other, transient or dwelling therein, leaving open and free to them the tribunals of justice for their judicial intercourse, on the same terms which are usual and customary, with the natives or citizens and subjects of the country in which they may be; for which they may employ, in defense of their rights, such advocates, solicitors, notaries, agents, factors, as they may judge proper in all their trials at law" (8 Stat. 390, at 392).

While the Commerce and Navigation portions of the treaty were renounced by Brazil under the terms of the treaty, Article 12 above is not a part of the Commerce and Navigation clauses and is in effect.

The *Status of Aliens Treaty* (Treaty Series, No. 815), between *inter alia* the United States and Brazil, proclaimed June 6, 1930, provides:

"Article 5. States should extend to foreigners, domiciled or in transit through their territory, all individual guaranties extended to their own nationals, and the enjoyment of essential civil rights without detriment, as regards foreigners, to legal provisions governing the scope of and usages for the exercise of said rights and guaranties.

"Article 8. The present convention does not affect obligations previously undertaken by the contracting parties through international agreements."
(46 Stat. 2753)

The complete text of the Treaty is printed in Appendix D, page 18.

2. Article III, Section 2 of the Constitution of the United States provides:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Article IV Section 1 of the Constitution of the United States provides:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Article VI, Section 2 of the Constitution of the United States provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The XIV Amendment of the Constitution of the United States provides:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Under the authority of the United States, the United States has plenary power over external affairs and everything affecting external affairs as an attribute of its sovereignty under the Constitution of the United States, and not dependent upon affirmative grants in the Constitution.

U.S. v. *Curtis Wright Export Corp.*, 299 U.S. 304 (1936);
U.S. v. *Belmont*, 301 U.S. 324, 331, 332 (1937);
Hines v. *Davidowitz*, 312 U.S. 52 (1941);
U.S. v. *Pink*, 315 U.S. 203, 218 (1942).

In *Hines* v. *Davidowitz, supra*, this Court stated, at page 62:

"That the supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution, was pointed out by the authors of The Federalist in 1787, and has since been given continuous recognition by this Court.

"The importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field are clearly developed in Federalist papers No. 3, 4, 5, 42 and 80."

In *U.S. v. Pink, supra* this Court stated, at page 218;

". . . As in cases arising under the full faith and credit clause (*Huntington* v. *Attrill*, 146 U.S. 657, 684;

Adam v. *Saenger,* 303 U.S. 59, 64), these questions of foreign law on which the asserted federal right is based are not peculiarly within the cognizance of the local courts. While deference will be given to the determination of the state court, its conclusion is not accepted as final."

Statement of the Case

1. This case is one of a series of collateral attacks launched by the respondents beginning in 1947 against the 1932-1933 Czechoslovakian *in rem* probate proceedings, administration, disposition and adjudication of the estate of Thomas Bata, who died in an airplane crash on July 12, 1932, he and all the parties hereto being then citizens and residents of Czechoslovakia.

Respondents seek possession and title to the majority shares of the key Swiss holding company of the Bata shoe enterprises, Leader A.G., and the shares of two Delaware holding companies which had held said Leader shares, all of which are claimed by the petitioner as his property under the Czechoslovakian probate proceedings.

The defense, based on the rule set forth by Chief Justice Marshall in *Williams* v. *Amroyd, supra* and restated by Justice Holmes in *Hapai* v. *Brown,* 239 U. S. 502, (1916), of the lack of jurisdiction of the Supreme Court of Delaware to entertain and adopt such a collateral attack on an *in rem* adjudication of a court of competent jurisdiction in a civilized state. and the claim of the rights of the petitioner, a citizen of Brazil, under the treaties between Brazil and the United States, and under the constitution and authority under the United States, was made in the Petition for Reargument in the court below Appendix E pages 21-25, 47, 51, 52.

The Court below considered and rejected the defense and claim in its Opinion dated April 25, 1961, Appendix A page 161.

The issue of the full faith and credit and of the effect to be given the New York decision was extensively litigated throughout the proceeding and considered at length by the Court below in both the August 3, 1960 and the April 25, 1961 Opinions. Appendix A pages 116 and 170, 171. The Court below gave conclusive effect to a finding of the New York Court, in the April 25, 1961 Opinion as follows; "Hence it (the New York finding) is a determination binding in this proceeding under the doctrine of collateral estoppel." Appendix A page 171.

The issue of respect and comity for the decision of the Supreme Court of the Netherlands sustaining and in harmony with the Czechoslovakian probate adjudication was extensively litigated throughout the proceeding and considered at length by the Court below. In the August 3, 1960 Opinion the Court below, in confirming the Chancellor's decree, but not appearing to concur in all of his reasoning, stated: "As the Chancellor said, 'comity' really means that Delaware is free to adopt whatever rule it desires with respect to the effect to be given to foreign judgments". Appendix A page 122. In the May 1, 1961 letter opinion the Court below again emphasized its view of wide discretion as to the effect to be given foreign judgments. Appendix A page 178.

The petitioner claimed rights under the Constitution of the United States with reference to the Dutch judgment in his main brief in the Supreme Court of Delaware dated January 24, 1959 Volume I page 126.

2. The background facts are as follows:

The Bata family of Moravia, Czechoslovakia, have been shoemakers for three centuries. Many members of the family have participated in the shoemaking business for generations.

In 1908 Antonin Bata, brother of Thomas, half-brother of petitioner Jan A. Bata, and uncle of respondent Thomas

J. Bata, holding one half of the ownership of the Bata shoe business headquartering at Zlin, Czechoslovakia, died and his one half was received by the elder Thomas Bata who previously held the other half and thereby Thomas Bata became the holder of the ownership of the entire Bata shoe business and was known as "Chief". In words and deeds Thomas Bata stressed the social and community responsibility of ownership and minimized the personal aspects.

The enterprise was expanded into many countries principally on the basis of export from Czechoslovakia. The 1930 worldwide depression and the barriers to trade and high tariffs of this period adversely affected the business. The 1930 beginning of the rise of Hitler and the Nazis of Germany and of Stalin and the Communists in Russia posed dual threats of turmoil and of war to Czechoslovakia and to the Bata companies.

In February 1930 Thomas Bata organized Leader A. G. as a Swiss Holding Company to hold majority shares of most of the other foreign Bata corporations and to hold capital reserves. Dr. George Wettstein, a Swiss lawyer, was the principal mandatary. When, on July 12, 1932, Thomas Bata died in an airplane crash at the age of 56, two personally handwritten signed documents were found next to each other in his safe. One was dated May 10, 1931 and the other dated May 19, 1931.

Agreed English translations of the two documents, as corrected by the deceased, are printed in Appendix B, page 13-17.

Both documents were turned over to the probate commissioner, Dr. Hugo Foerster, notary of Zlin.

The Czechoslovakian probate court proceeded to probate the estate on the basis of the validity of both holographic documents. Agreed English translations of the orders, decrees, and certificates, and of a summary of the proceedings are reprinted in Appendix B.

The estate of Thomas Bata was disposed of in accordance with the probate orders and proceedings and on the basis of the validity of the two holographic documents. The Bata employees fund, the City of Zlin, the sister Anna Scheibel, the Scheibel nieces and nephews, the widow, Marie Bata, Thomas J. Bata, and Jan A. Bata received in a manner and form each considered acceptable at the time the various amounts of cash and credits, landed estates, and shares of the Bata companies as specified in the two holographic documents and as adjudicated by the orders and decrees of the probate court.

Petitioner Jan A. Bata, then 34 years of age, became the successor "chief" of the Bata enterprises, the holder of the shares of the companies, and the controller of the Swiss mandataries. He exercised all the attributes of ownership and title to all of the shares of all of the companies. He did so with the same concepts of the social and community responsibility of ownership and the same minimizing of personal perquisites as had characterized his brother Thomas' actions.

The business prospered and multiplied and in 1939 was at least five times as large as it had been in 1932, with many new companies, new factories, and new shoe stores in numerous countries, and especially in areas remote from the war dangers of Europe.

Thomas J. Bata was placed by Jan A. Bata in positions of increasing responsibility and authority in the English Bata Company, the Belgium Bata Company, and as President of the Canadian Bata Company. Many other members of the Bata family were in the enterprise.

When World War II began in Europe and the Nazis occupied Czechoslovakia Jan A. Bata came to the United States and then went to Brazil where he became a citizen. With the Czechoslovakian headquarters of the Bata companies occupied by the Nazis, and with Dr. George Wett-

stein of Switzerland declining to give any precise information about the Bata enterprises, and with Jan A. Bata in Brazil, the British government placed Leader A.G., most of the Bata companies, and Jan A. Bata on the restricted trading list. The United States government then did the same. The postwar opening of records make it clear that Jan A. Bata did not at any time trade with or aid the enemy, that he in fact assisted all of the 250 Jewish employees of Bata in Czechoslovakia and their families to escape the Nazis by sending them out to free Bata companies before the tragic persecutions. He sent large quantities of machinery out of Czechoslovakia to the Allied countries. He declined to align closely with the Czech government in exile because of concern for reprisals against employees and families and on the grounds the government in exile was too open to communism, a concern which was unfortunately proven to be right in 1948.

While on the restricted trading list in 1942, Jan A. Bata, with the knowledge of the United States, Canadian and British governments, placed the administration of the Bata enterprises in a committee of which Thomas J. Bata of Canada was chairman, with an agreement for the return of the companies to him six months after the end of the war.

When the war ended, Thomas J. Bata, taking advantage of his position as wartime administrator of the Bata companies and of his close relationship to the Swiss mandataries, he having married the daughter of Dr. George Wettstein, head mandatary, turned on his uncle, Jan A. Bata, and launched a multiple collateral attack upon the Czechoslovakian probate proceedings and upon the holographic documents. A series of lawsuits were instituted by him in New York, the Netherlands, Delaware, London and Zurich.

In a New York case he won a decision for the minority bearer Leader shares which were in the safety deposit of the deceased financial assistant Frank Muska (306 N.Y. 96). Appendix C page 1.

In a Netherlands case he lost a decision for the minority shares of the Dutch Bata company known as Bata Best. Appendix C page 17.

In a Swiss case he obtained the mandator position.

In the instant case the decision of the Chancellor is in favor of the respondents and this decision has been affirmed by the Supreme Court of Delaware in Opinions dated August 3, 1960 and April 25, 1961. Final judgment in the Court below is dated May 4, 1961.

The petition is for the issuance of a Writ of Certiorari to review this judgment of the Supreme Court of the State of Delaware.

Reasons for Allowance of the Writ

1. The Supreme Court of Delaware has decided federal questions of substance in a way not in accord with applicable decisions of this court.

In this action between aliens, the Supreme Court of Delaware has made a collateral attack upon the 1932-1933 *in rem* Czechoslovakian probate proceedings, administration, disposition and adjudication of the estate of Thomas Bata, conducted by a court of competent jurisdiction in a civilized nation state, with which the United States had friendly relations. This decision of the court below is contrary to the decisions of this court confirming the rule against collateral attack on *in rem* proceedings and is also contrary to this court's decisions requiring respect for the principles of comity. The court below is without jurisdiction to make such a collateral attack, under the decisions of this court.

This rule was first set forth by Chief Justice Marshall in *Williams* v. *Amroyd, supra.*

This statement of the law has been followed in an unbroken line of decisions. These include a decision expressed with clarity by Justice Oliver Wendell Holmes who set forth the same rule in *Hapai* v. *Brown, supra.* The

case involved a bill to quiet title to a large tract of land in Hawaii. Justice Holmes said at page 504:

> "But as we cannot doubt the import of the decree when rendered, we are narrowed in our inquiry to the question of jurisdiction in an accurate sense. Unless we are prepared to pronounce the decree void for want of power to pass it and open to collateral attack, the decision in this case must stand."

The rule applies to judgments *in rem* under municipal law. *Ennis* v. *Smith*, 55 U.S. (14 How) 400 (1852); *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 291 (1888); *Scott* v. *McNeal*, 154 U.S. 34, 46 (1894); *Hilton* v. *Guyot*, 159 U.S. 113, 167 (1895).

The rule also applies to decisions of Courts of admiralty and prize, which proceed upon principles of international law. *Ludlow* v. *Dale*, 1 Johns. Cas. 16.

Probate proceedings are *in rem* proceedings. *Christianson* v. *King County*, 239 U.S. 356, 373 (1915), *Tilt* v. *Kelsey* 207 U.S. 43 (1907).

Such proceedings cannot be collaterally attacked. *Doran* v. *Kennedy*, 237 U.S. 362 (1915).

The Courts of England have gone so far as to say that no British Court may collaterally attack a judgment *in rem* of a foreign court even though it affirmatively appears that a person seeking to impeach the foreign judgment has a preferential title under the law of England. *Castique* v. *Imbrie*, L.R. 4 H. L. 414; or even though the document probated in a probate proceeding was actually a forgery, so long as the probate decree remained unrepealed in the probate courts. *Allen* v. *Dundas*, 3 T.R. 125.

The reasons for the rule against collateral attack upon *in rem* proceedings are obvious in that proceedings *in rem* adjudicate property rights. Such attacks, if legally possible, would create situations where effective administration of justice would be impossible. Other legatees and

claimants would be involved. A redistribution of the entire estate would be necessary, but that could not be done by the foreign courts. Questions would arise, as to what would happen to prior wills (there were two prior wills in this case), if courts other than the original probate courts were permitted to declare invalid a testamentary instrument which a probate court had held to be valid, and under whose provisions the probate court had actually distributed the estate.

Through this collateral attack made without jurisdiction the Supreme Court of Delaware has decided to take away the property of the petitioner, a citizen of Brazil, and turn it over to the respondents, citizens of Canada and Bermuda. Brazil and the United States have treaties in force which confer relevant rights upon the petitioner.

In Respondent's May 15, 1961 memorandum of opposition to petitioner's application in this court for a stay, respondents shift their position to a claim that they are not making a collateral attack. This late shift in respondent's position seems significant. In any event, the collateral attack nature of respondent's case and of the decision of the court below is inescapable from the record.

Records of the proceedings in the Czechoslovakian court are appended as Appendix B. From these records it is clear that the probate proceedings are based squarely on the validity of the two holographic documents. From these records it is submitted that no other conclusion can be reached but that the assets which were distributed to the respondents were not at all the world-wide Bata shoe business but were the landed estates valued at 3,100,000 Czech kronen plus a portion of a cash sum of slightly more than 54,000,000 Czech kronen which the probate court required the petitioner to provide for the benefit of the deceased's widow and child and other relatives and employees in exchange for the ownership of the

world-wide Bata shoe industries which the Czechoslovakian probate court administered as becoming the property of the petitioner herein under testamentary documents accepted and executed by the probate court, all in accordance with the clear intent of the testator expressed in holographic documents. The obligation to provide 54,000,000 Czech kronen for distribution among the testator's wife, child, employees, and home city, was faithfully performed by the petitioner, and his performance was approved by the Czechoslovakian Probate Court.

It will be noted that all of the arithmetic of the Czechoslovakian Probate proceedings ties together precisely in support of petitioner's position. The basic amount was 50,000,000 Kc., plus an amount for the City of Zlin estimated at 4,300,000 Kc. The landed estates were valued at 3.100,000 Kc. Thus a total of 57,400,000 Kc. is specified. Appendix B page 14, 15, 16.

The City of Zlin amount is established at 4, 162, 131 Kc. Appendix B page 26. The testator's watch and personal effects are valued at 11,000 Kc. Appendix B page 27. Thus the 50,000,000 Kc. plus 4, 162, 131 Kc. plus 3,100,000 Kc. equals 57,262,131 Kc. Appendix B page 33. Adding the 11,000 Kc. personal effects equals 57,273,131 Kc. Appendix B page 27. This is the exact total of the detailed items Appendix B page 34, 35.

The Czechoslovakian probate court proceedings are susceptible to no other interpretation. The attempt to change this distribution is a collateral attack, and it is well established that the orders and decrees encompass all essential facts and law for their validity. *Milliken* v. *Meyer*, 311 U.S. 457, 462 (1940); *Adam* v. *Saenger*, 303 U.S. 59 (1938); *Fauntleroy* v. *Lum*, 210 U.S. 230 (1908).

Another attempt by the respondents to bolster their position by claiming concessions by petitioner's trial counsel in his brief will also not stand analysis. It is undisputed that petitioner never wavered in his claim of

title on the basis of the validity of the two documents as accepted and affirmed by the Czechoslovakian Probate Court. Petitioner's deceased counsel's briefs appear to be more correctly described as assumptions merely for the purpose of argument of alternative defenses, and as not intended at any time as substantive concessions.

In his main brief in the Supreme Court of Delaware, Volume one, on the facts, at page 85, he stated:

> "Meanwhile, it seems enough, regardless of legal theory asserted either by Jan or his lawyers, that Jan has consistently and unequivocally claimed full ownership."

And in his reply brief in the Supreme Court in Delaware, he stated:

> "We pointed out how Jan's testimony on the subject has never varied, but only the legal analysis of the facts made by successive groups of lawyers. (Reference Main Brief, pages 84-85)".

Nor could counsel concede a substantive point without approval of the petitioner. *Lilly* v. *Grand Trunk Western Railroad Company* 317 U.S. 481, 489 (1942). Nor could counsel create by concession jurisdiction for collateral attack when the court lacked such jurisdiction.

2. The Netherlands Supreme Court judgment was entered in an action brought by the respondents against the petitioner, and was in favor of the petitioner. It sustained and was in harmony with the Czechoslovakian *in rem* probate proceedings. But the Supreme Court of Delaware stated:

> "As the Chancellor said, 'comity' really means that Delaware is free to adopt whatever rule it desires with respect to foreign judgments."

The Court below appeared to differ somewhat, in the August 3, 1960 opinion, with this holding of the Chancellor, but included a similar statement in the letter opinion of May 1, 1961. Appendix A page 177, 178. The Court below did misinterpret the Netherlands decision, and misapplied the principles of comity, in also refusing to give effect to the decision of the Supreme Court of the Netherlands.

This decision of the Supreme Court of Delaware is contrary to the decisions of this court.

3. The Supreme Court of Delaware has decided that the treaties between the United States and Brazil do not have any pertinency to this litigation. Appendix A page 172.

This court has not heretofore determined the rights of citizens of Brazil or other aliens under these treaties, or the relationship of these treaties to comity for foreign judgments, or the meaning of the term "special protection", or the effect of these treaty rights upon decisions of state courts taken without jurisdiction.

Each of the treaties with Brazil should be interpreted, as a minimum, to extend to the petitioner the right that his property shall not be taken from him by the Courts of Delaware acting without jurisdiction.

4. The conduct of external affairs under the authority of the United States, as confirmed by the decisions of this court, requires that the courts of the states shall not collaterally attack, overrule, and fail to respect foreign judgments in the circumstances here presented with reference to the Czechoslovakian and Dutch decisions.

This area is clearly a matter of federal concern and is inseparably related to the conduct of external affairs under the authority of the United States. Article III Section 2 of the Constitution of the United States.

An exposition on the important relationship between court decisions affecting aliens and the external affairs

of the United States is given in *Federalist paper No. 80*, wherein Alexander Hamilton said:

> "• • • As the denial or perversion of justice by the sentences of courts, as well as in any other manner, it is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility."

5. The Supreme Court of Delaware has extended full faith and credit (Appendix A page 171) to a finding of the New York Court which is a nullity for lack of jurisdiction, is an irrelevant finding, and is a finding which would not be binding in New York in any event as the New York Court of Appeals specifically limited the decision to the shares in issue in the New York case (Appendix C page 16).

This error of the Supreme Court of Delaware is a federal question of substance.

Article IV Section 1 of the Constitution of the United States.

28 U.S.C. Section 1738

In *Tilt* v. *Kelsey supra* this court stated at page 57:

> "They (judicial proceedings) can have no greater or less or other effect in other courts than in those of their own state."

The New York finding that if a controversy had arisen in Czechoslovakia over an intervivos contract involving more than 5,000 Kc., this litigation would have been conducted in another court, is immaterial and irrelevant to the admitted jurisdiction of the Czechoslovakian probate court to conduct the probate proceedings in the estate of Thomas Bata. The record shows that there was no con-

troversy and there was in fact participation, consent, and confirmation of the probate proceedings. Appendix B.

The New York case in its entirety also constitutes a collateral attack on the Czechoslovakian *in rem* probate proceedings, and is a nullity for lack of jurisdiction.

Thus, full faith and credit has been given to a New York finding in error.

6. If the courts of the fifty states were permitted to attack collaterally the probate proceedings and adjudications of civilized foreign nation states, the result would be chaotic conditions of title to property, and widespread discords and violations of treaty and constitutional rights, and a detriment to the foreign policy of the United States.

Worldwide development and stability and the best interests of the United States both require that the courts of the states and of the United States shall not have jurisdiction to attack collaterally *in rem* probate proceedings conducted by courts of competent jurisdiction in civilized foreign nation states with which the United States has friendly relations.

Conclusion.

For the foregoing reasons, it is respectfully submitted, application for a Writ of Certiorari should be granted.

(s) Harold E. Stassen,
(s) Amos J. Peaslee,
Counsel for Petitioner.

Amos J. Peaslee, Jr.
Gerald J. McMahon,
A. Evans Kephart,
George Tyler Coulson,
Of Counsel.

May 24, 1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960 No.

JAN A BATA

Petitioner,

v.

THOMAS J BATA, THOMAS J. BATA and DAVID GRAHAM as Executors of the Estate of Mary T. Bata, and WESTERN INVESTMENT AND TRADING COMPANY LIMITED, a Bermuda Corporation,

Respondents.

APPENDIX A

To Petition for Writ of Certiorari

DELAWARE

The decree of the Chancellor, and the opinions and final judgment in the Supreme Court of the State of Delaware.

APPENDIX A

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 495

THOMAS J. BATA; THOMAS J. BATA and DAVID H. GRAHAM, as Executors of the Estate of Mary T. Bata; and WESTERN INVESTMENT AND TRADING COMPANY, LIMITED, a Bermuda corporation,

Plaintiffs,

v.

DONALD M. HILL; DONALD M. HILL, JR.; DONALD M. HILL and DONALD M. HILL, JR. as Voting Trustees under Voting Trust Agreement for North River Securities Corporation, a Delaware corporation, dated October 22, 1940; CHARLES JUCKER and HANS BERGER, individually, as mandatories in accordance with the law of Switzerland, and as a partnership; NORTH RIVER SECURITIES CORPORATION, a Delaware corporation; WALTER RUNGE, LOUIS F. SPERRY and FRANK A. SELLER; EDWARD N. GOODWIN, NICHOLAS DANFORTH, A. TURNEY SAVAGE, HAROLD J. FAULKNER, WILLIAM F. CLARE, JR. and A. PENNINGTON WHITEHEAD, partners in the practice of law under the firm name of "Goodwin, Danforth, Savage & Whitehead" successor firm to a partnership which practiced law under the firm name of "Campbell, Harding, Goodwin & Danforth"; EDWARD N. GOODWIN and HAROLD J. FAULKNER, as surviving Voting Trustees under a Voting Trust Agreement for Westhold Corporation, a Delaware corporation, dated October 14, 1940; CAGODAN CORPORATION, a New York corporation; WESTHOLD CORPORATION, a Delaware corporation; NEW WORLD INVESTMENTS LIMITED, a Canadian corporation; ROYCAN & Co., a Canadian partnership; N. V. HOLLANDSCHE HANDELMAATSCHAPPIJ BAVE, a Dutch corporation; PER NORGREN, as Liquidator of N. V. HOLLANDSCHE HANDELMAATSCHAPPIJ BAVE, a Dutch corporation; N. V. NEDERLANDSCHE SCHOEN-EN LEDERFABRIEKEN

BATA-BEST, a Dutch corporation formerly bearing the name of N. V. SCHOEN-EN LEDERINDUSTRIE AMSTERDAM; JAN A. BATA; TRANSOCEANIQUE S. A., a Luxembourg corporation; HANS BERGER, as Liquidator of Transoceanique S. A., a Luxembourg corporation; and LEADER A. G., a Swiss corporation,

Defendants.

(February 14, 1958)

Robert H. Richards, Jr., of Richards, Layton & Finger of Wilmington; *Inzer B. Wyatt, Robert MacCrate* and *John W. Dickey* of Sullivan & Cromwell of New York City for plaintiffs.

George T. Coulson of Morris, Steel, Nichols & Arsht of Wilmington; *Henry Cohen* and *Daniel M. Sandomire* of Cohen & Sandomire of New York City for defendants, Donald M. Hill, Donald M. Hill, Jr.; Donald M. Hill and Donald M. Hill, Jr., as voting trustees; Jan A. Bata and North River Securities Corporation.

Henry A. Wise, Jr., of Wise and Suddard of Wilmington for defendant, Westhold Corporation.

William Poole of Berl, Potter and Anderson of Wilmington for Charles Jucker and Hans Berger, individually, as mandatories in accordance with the law of Switzerland, and as a partnership.

The other defendants have either not been served or not appeared.

SEITZ, Chancellor: Basically, this is a dispute over the ownership of certain stock admittedly owned by Thomas Bata ("Thomas" or "testator") at his death on July 12, 1932. While there are several plaintiffs and defendants, it is agreed that the real dispute is between the plaintiffs, Thomas J. Bata ("Tom"), only son of the deceased and the executors of the Estate of his mother, Mary T. Bata, (who died February 27, 1954) on the one hand, and the defendant, Jan Bata, half-brother of Thomas, on the other.

Reference to "plaintiffs" will embrace Tom and the Estate while reference to "defendant" will embrace only Jan unless otherwise indicated.

By this action plaintiffs and defendant both seek to be declared the beneficial owner of the following property:

1. 890 bearer shares of the capital stock of Leader, A.G., a Swiss corporation.
2. 280 bearer shares of the capital stock of Leader, A.G., a Swiss corporation.
3. 5,084 shares of the capital stock (being all the outstanding stock) of North River Securities Corporation, a Delaware corporation.
4. 2,200 shares of the capital stock (being all but 300 shares of such stock outstanding) of Westhold Corporation, a Delaware corporation.

No challenge to the court's jurisdiction to decide the issues is raised by any party. The Leader shares (Swiss holding company) are bearer certificates which are physically within this court's custody[1]. The other property involved is stock of Delaware corporations which is evidenced by certificates on deposit with the court. The Delaware corporations were created long after Thomas' death. It is agreed however that their ownership will follow, derivatively, the determination of ownership with respect to the Leader shares. They will therefore be given only limited independent consideration in this opinion.

---

[1] While there are "duplicate" stock certificates of a non-negotiable nature outstanding, issued to another Swiss corporation during World War II, this court has so far as possible rendered that fact of limited importance by *requiring* the parties to execute an instrument by which they have in effect agreed that their interest in the "duplicate" certificates, should be determined by the decision here with respect to the bearer certificates. See Bata v. Hill, (Del. Ch.), 112 A.(2) 519; Bata v. Hill, (Del. Ch.), 113 A.(2) 740.

This litigation has a background of such magnitude that timely justice demands that the court restrain itself in painting the factual picture.[2]

Thomas Bata, a resident of Czechoslovakia, died there in a plane crash on July 12, 1932. At that time he was admittedly the beneficial owner of the shares of the various companies throughout the world which constituted the Bata shoe manufacturing and selling enterprise. On the day of his death two documents written in his own handwriting were found in separate sealed envelopes in his safe. One purported to be a sales agreement dated May 10, 1931, by which Thomas sold all his stock in the various operating and holding companies to his half-brother, Jan Bata. The other, self-described as "My last will", dated May 19, 1931, purported principally to will to his widow, Mary, and only minor son, Tom, inter alia, the proceeds of the claim arising from a past sale to Jan.

Under Czech law, wills may be either "testaments" or "codicils". A "testament" names heirs (persons who are given all or fractional parts of the estate). A codicil contains legacies but does not name heirs. The will here is technically a "codicil" but will be referred to herein a "testament" or "will".

Despite the fact that the purported sales agreement was dated May 10, 1931, it is conceded that Thomas continued to be the exclusive owner and chief of the business until his death on July 12, 1932.

It was decided in litigation in both New York and Holland and is here taken to be established that there was no valid inter vivos sale under Czech law. It is admitted that by the Czech court's deed of delivery, the heirs, Tom and Mary, took title to all of Thomas' estate subject to the obligation to pay debts and legacies. Thus,

[2] The trial, apart from innumerable pre-trial motions, consumed 100 trial days, created 15,000 pages of testimony, apart from the additional thousands of pages of depositions and of exhibits, many of which had to be translated. To this must be added 1,500 pages of "briefs".

they took title to the Leader shares here involved. I pause to note that Czech law, prior to the Communist seizure, is controlling. Much of that law is found by reference to Austrian Civil Code provisions and court decisions because, of course, Czechoslovakia was part of the Austrian-Hungarian Empire until World War I.

Commencing at Thomas' death, Jan took over the management of the various operating businesses with the full cooperation of the heirs. The Bata Companies were making and selling shoes in large numbers. It was then a big business but was destined to expand much more in the years to come despite the loss of the assets beyond the Iron Curtain. It is disputed whether Jan took over as owner and whether he took over the Leader bearer certificates at all.

Thomas had caused Leader to be created in 1931 and transferred to it a majority of the shares of most of the operating companies. Two thousand Leader bearer certificates were issued. Four of these shares were held by Swiss mandatories as qualifying shares and the rest were ultimately held for Thomas by his trusted lieutenant, Muska. Thomas controlled Leader by virtue of what is known as a mandate relationship. Under the agreement covering this relationship, Thomas (mandator) gave instruction to certain Swiss lawyers (mandatories). Subject to Swiss law and the corporation's charter and by-laws, the mandatories were bound to follow such instructions with respect to the affairs of Leader.

The mandatories recognized Jan's right to give orders after Thomas' death and until the dispute broke out several years later between the heirs and Jan. Thereafter they were required to be neutral.

The operating companies continued under the control of Jan until he was compelled to withdraw by virtue of being placed on the British and American black lists during World War II. He then took up residence in Brazil and was not in the "general picture" for several years.

Some time during this period, Tom, who was then in his early thirties, took control almost by "default" of nearly all the Bata enterprise beyond the German sphere of influence. Tom still controls the vast operation pending a determination of this litigation which involves ownership determination of the majority shares of the holding company, Leader.

The disagreement between Tom and perhaps his mother, Mary, on the one side and Jan on the other was "brewing" for some time and reached the breaking point in the middle forties. By that time it was apparent that a dispute had arisen as to whether Jan or the heirs owned the various shares of stock left by Thomas, particularly the stock of Leader.

The dispute produced the expected litigation in various places. Plaintiffs first commenced an action in Switzerland on March 28, 1947 to compel the Swiss mandatories to maintain the *status quo* until further order of the court. An order to this effect is still in force.

In an entirely independent action commenced in Switzerland on June 28, 1947, the heirs sought a declaratory judgment against the Swiss mandatories to have themselves declared entitled to be treated as Thomas' successors with respect to the mandate. Jan was interpleaded in the Swiss action and actively opposed plaintiffs' contentions. The trial court and the intermediate appellate court (decision final as to foreign law) have determined that the heirs are entitled in effect to operate as successors to Thomas with respect to the mandate relationship. The decision is discussed more fully later herein but it should be noted here that the decision is admittedly not entitled to binding force in this action.

The Leader shares (except perhaps for the four qualifying shares) were physically transferred at various times after Thomas' death. Muska, a trusted lieutenant of Thomas and later of Jan and the enterprise, died in the middle forties. Certificates for 826 Leader bearer shares

were found in his safe deposit box in a bank in New York. The heirs immediately commenced a replevin action in the New York State Court against the Bank and Muska's administrators to obtain possession on the ground that they belonged to plaintiffs as the heirs of Thomas. Once again Jan was interpleaded and claimed ownership of the shares.

Before the New York action was completed, plaintiffs, on June 23, 1949, commenced an action in Holland to obtain possession of certain stock and dividends of the Dutch Bata Company. Once again Jan was a defendant claiming ownership.

In time the New York action was completed through the highest court and it was determined that plaintiffs were entitled to delivery of the Leader shares found in the New York bank. See Bata *v.* Bata, 99 N. Y. S. (2) 535; 108 N. Y. S. (2) 659; 115 N. E. (2) 672. Basically, as hereafter decided, the court concluded that there was no valid *inter vivos* agreement between Thomas and Jan and that consequently, Thomas died intestate as to the Leader shares there involved and the heirs were entitled to them, that they received them under the deed of delivery and continued to hold the shares as Thomas' intestate heirs. The court also decided that the heirs were not equitably estopped to claim the shares.

Before the New York litigation was concluded in the highest court of that State, the Dutch trial court determined the case on the merits. Despite the lower New York court's decision to the contrary, (which had been called to its attention) the Dutch Court concluded that the facts justified a conclusion that there was an *inter vivos* agreement between Thomas and Jan. It further concluded that even if there were no *inter vivos* agreement, the documents showed an intention on Thomas' part to create a "purchase legacy" in favor of Jan which, along with other facts, justified Jan's claim to the property there involved

under a doctrine of Czech law known as acquisitive prescription.

Because of its importance to our case, I pause to discuss the "purchase legacy" concept upon which defendant places principal reliance in this action. It is conceded that it does not appear in any Code provision. While it may have been seldom used, I am satisfied that the Czech court would recognize a "purchase legacy," *i.e.*, a will provision granting a specific entity the right to purchase an asset of an estate. It is also variously called a "*legatum venditionis causa*," "sales legacy" or "*aufgriffsrecht.*" For convenience, I shall hereinaffer refer to the concept as "sales legacy."

After the New York judgment became final and before the appeal to the Dutch intermediate court of appeal was determined, plaintiffs commenced this action in Delaware seeking delivery of stock of two Delaware corporations, one of which then held certificates for 890 bearer shares of Leader. Subsequently, the 890 bearer shares plus 280 additional bearer shares of Leader were physically deposited with the court and are the subject of an ownership determination in this action. Thus majority ownership is here involved.

While this cause was being tried the Dutch Appellate Court concluded on the merits, without mentioning the New York determination which it had been asked to consider as a fact, that there was no *inter vivos* agreement. Thus, it reached the same conclusion as the New York court on this point. However, the court concluded that the two May 1931 documents created a sales legacy under Czech law which with other facts gave Jan the right to the Dutch shares and dividends under the doctrine of acquisitive prescription. Whether the sales legacy issue was ever decided by the New York court is a matter hereinafter considered.

The contentions of the parties in this action may be much more simply stated than resolved.

Plaintiffs first claim on the basis of the Full Faith and Credit Clause or the collateral estoppel doctrine that the New York judgment is conclusive of all issues here presented and requires a determination in plaintiffs' favor. Plaintiffs contend that even if the New York judgment is not conclusive on the present issues plaintiffs are entitled to judgment in their favor on the merits.

Defendant concedes that there can be no determination by this court of the existence of an *inter vivos* transaction between Thomas and Jan. He claims that the New York judgment did not determine the sales legacy issue—the theory upon which the defendant principally relies here. Thus, he contends that with respect to the sales legacy issue here the New York judgment is not entitled either to Full Faith and Credit or collateral estoppel effect. In contrast, defendant argues that on the basis of collateral estoppel this court must accept as binding the Dutch court's determination that the May 1931 papers created a sales legacy in Jan's favor which he accepted.

Defendant next contends that if the matter is to be viewed on its merits, Jan should nevertheless succeed because this court should find that the May 1931 documents, interpreted with the aid of extrinsic evidence, created a sales legacy in his favor, which was duly accepted by him. Alternatively, he argues, under the doctrine of constitutive recognition (later agreement by the heirs recognizing sales legacy) as announced under Czech law, Jan is entitled to be recognized as the owner of the stock here involved. Finally, Jan argues that even if the heirs were the owners they have lost the right to assert their ownership because of their tacit waiver or disclaimer.

New York Judgment

Since plaintiffs first contend in this action under various theories that a certain New York judgment in plain-

tiffs' favor in an action involving the same principal parties but different property constitutes a binding decision which this court must follow in disposing of the present litigation, I turn to that judgment.

Plaintiffs assert that the New York judgment must be given Full Faith and Credit effect here under the U. S. Constitution. Under Delaware law the doctrines of *res judicata* and collateral estoppel require that the same effect be given a New York judgment rendered upon adequate jurisdiction as New York itself would accord such a judgment. Lewis *v.* Hanson, (Del. Supreme Ct.), 128 A.(2) 819. See Iowa-Wis. Bridge Co. *v.* Phoenix Finance Corp., 2 Terry 527, 25 A.(2) 383; Fryberger *v.* Consolidated Elec. & Gas Co., 22 Del. Ch. 357, 7 A.(2) 211; Schuylkill Fuel Corp., *v.* B. & C. Nieberg Realty, (N. Y.), 165 N. E. 456. This being so, if such principles are correctly applied to the facts of this case no violation of the Full Faith and Credit Clause and implementing statute can arise

I therefore first consider whether under New York law the New York judgment in Bata *v.* Bata, above, is *res judicata* and thus a bar to a determination of this action on its merits. I say this because this court will only give such effect to the judgment of a sister state as that state would give its own judgment.

Parenthetically, in judicial usage in Delaware as elsewhere the term "*res judicata*" generally refers to the doctrine by which a court bars the same parties from relitigating the merits of the same cause of action. However, in the "Restatement of Judgments" it has the broader usage of referring to all binding effects of former adjudications. Because the cases generally use the term "*res judicata*" to refer to situations where the same parties are precluded from relitigating the merits of the same cause of action I shall continue to employ the term in that sense.

As noted, a prior action between the same parties is a bar to the relitigation of the merits in a subsequent action under the *res judicata* doctrine only if it also involved the same cause of action. This is concededly the New York law in this field. See Schuylkill Fuel Corp. *v.* B. & C. Nieberg Realty, above. It is further conceded that the New York action involved a determination of title to different property from that here in dispute. Consequently, under New York law the judgment did not involve the same cause of action as is present in this court. Thus, the judgment would not be *res judicata* in a second action in New York between the parties where different property was involved. Compare Schuylkill Fuel Corp. *v.* Nieberg Realty, above. The *res judicata* doctrine is not then a bar to the determination of this action on its merits. Compare Lewis *v.* Hanson, above; 65 Harvard Law Review, 820, 833; and see Fryberger *v.* Consolidated Elec. & Gas, above.

I might say that I agree with plaintiffs that the language of the New York Court of Appeals in the Bata case limiting its decision to the bearer certificates of stock there involved does not automatically preclude the application of the *res judicata* and collateral estoppel doctrines. Compare 2 Freeman on Judgments, § 670.

But plaintiffs contend that even though the causes of action be technically different the judgment in the first action is binding in the second as to all claims, whether litigated or not, where a contrary judgment in the second action would impair "rights and interests" established in the first action, citing Schuylkill Fuel Corp *v.* Nieberg Realty, above. Defendant denies that the Schuylkill case doctrine has any application here.

Plaintiffs argue that the New York judgment established rights in the heirs to the property left by the testator because it was decided that the testator's property was not disposed of by any legacy in a will. Plaintiffs

say that the decision thus established the status of plaintiffs as intestate heirs. They go on to point out that in such a situation the cases hold that in a later action, although involving different property, the status issue cannot be relitigated if the same transaction is involved.

First of all, I do not believe the situation confronting the New York Court in the Bata case involved a "status" issue of the type which is given conclusive subsequent effect in the New York cases. See *e. g., In re* Zeitz's Estate, 135 N. Y. S. (2) 573. Such a holding would mean that nearly every determination could be said to establish a "status" and thus preclude subsequent litigation of "new" issues between the parties in a different cause of action.

The court in the Schuylkill case made the following statement:

> "* * * A judgment in one action is conclusive in a later one, not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first. Cromwell *v.* County of Sac, 94 U. S. 351, 24 L. Ed. 195, Reich *v.* Cochran, *supra.* It is not conclusive, however, to the same extent when the two causes of action are different, not in form only (Baltimore S. S. Co. *v.* Phillips, *supra*, page 321 of 274 U. S. [47 S. Ct. 600]), but in the rights and interests affected. The estoppel is limited in such circumstances to the point actually determined. Cromwell *v.* County of Sac, *supra*." * * *

Thus, the New York law only gives *res judicata* effect where the second action has such a measure of identity with the first that a different judgment in the second would impair or destroy rights or interests established in

the first. However, the rule does not apply where the second cause of action affects different rights and interests. Certainly different rights and interests are here involved because we are dealing with a demand for different property. The decision here cannot affect the title to the property acquired under the New York judgment. Also we are dealing with a legacy claim whereas the prior action decided a contract claim. The validity of this distinction is recognized in the following language of the Supreme Court in Cromwell v. County of Sac, 94 U. S. 351, (cited with approval in the Schuylkill case):

> "It is not believed that there are any cases going to the extent that, because in the prior action a different question from that actually determined might have arisen and been litigated; therefore, such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action."

I decide that if this action were before the New York Court it would conclude that its prior decision in the Bata case did not preclude a determination of the sales legacy issue on its merits. It follows therefore that such decision is not binding here. Compare "Restatement of the Law of Judgments", § 70(b).

Plaintiffs next contend that under the doctrine of collateral estoppel the defendant is prevented from relitigating the sales legacy issue. Defendant denies that the sales legacy issue was ever decided in New York and thus denies the applicability of the doctrine.

Generally speaking, collateral estoppel may be defined as stated in "Restatement of the Law of Judgments", § 68(1):

> "Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action, except as stated in §§ 69, 71 and 72." [the exceptions are not pertinent].

See also Iowa-Wis. Bridge Co. *v.* Phoenix Finance Co., above.

Preliminary, plaintiffs tacitly concede that the present action is a "different cause of action" for purposes of applying the collateral estoppel doctrine.

Plaintiffs state that defendant's claim in the New York trial court was based primarily upon the existence of an oral *inter vivos* agreement of sale between the testator and defendant. They insist, however that the sales legacy issue was raised and decided in the case on appeal and thus is binding here. Plaintiffs pick out numerous portions of the record on appeal in an attempt to show that the sales legacy issue was raised by defendant in New York. Assuming that the issue was raised on appeal, that does not dispose of the matter because the doctrine of collateral estoppel is applied only where the issue in question was actually determined in the initial action. This is the view taken by the New York courts. See Marine Transit Corp. *v.* Switzerland Gen. Insur. Co., 263 N. Y. 139, 188 N. E. 281. This is also the Delaware rule—Auerbach *v.* Cities Service Company, (Del. Supreme Ct.), 134 A.(2) 846. The burden of showing that the issue in question was decided in the prior action is upon plaintiffs. See Bell *v.* Merrifield, 109 N. Y. 202, 16 N. E. 55; compare Venetsanos *v.* Pappas, 21 Del. Ch. 177, 184 A. 489. What are the facts?

Plaintiffs say that all matters of substance in the case at bar were litigated and determined in New York. They list at least ten matters so determined but I shall discuss only four because the others are so clearly only findings concerning evidentiary facts that they could not be binding in a subsequent action under the collateral estoppel doctrine. House *v.* Lockwood, (N. Y.), 33 N. E. 595; "Restatement of the Law of Judgments", § 68(p). The four important matters which the plaintiffs say the New York Court decided are as follows:

1. whether the two May 1931 papers gave any rights to Jan in the shares of stock left by Thomas Bata;
2. whether Thomas Bata died intestate as to all the shares of stock he owned at his death;
3. whether the two May 1931 papers contained any testamentary disposition in favor of Jan;
4. whether Thomas Bata intended the two May 1931 papers as a fiction.

The manner in which the issues are posed by plaintiffs makes it difficult to analyze them. It is sufficient to say that for reasons hereafter given I do not believe the sales legacy issue was decided by the New York court.

Let us consider what the New York courts did decide. The trial court said, (Bata *v.* Chase, 99 N. Y. S. (2) 535, 547):

> "It is important, at the very outset, to understand the exact basis of Jan's claim to the 826 Leader shares. He does not claim that the document dated May 10, 1931, found in Thomas Bata's safe, in an envelope addressed to him, effected a sale to him of any of Thomas Bata's business properties or that it constituted a valid agreement to sell him those properties. Nor does he claim that the will of Thomas Bata

bequeathed to him all Thomas Bata's business properties, on condition that he pay him 50,000,000 Kc. Jan admits that, at the time of Thomas Bata's death, title to all the business, including the shares of Leader, was still in Thomas Bata (in substance, if not technically). What Jan does claim is that in May, 1931, he and Thomas Bata entered into an 'oral' contract by the terms of which he purchased all the business assets of Thomas Bata for 50,000,000 Kc; that this 'verbal' contract remained unperformed at the time of Thomas Bata's death and was a charge upon the latter's estate, * * *".

Clearly the sales legacy or testamentary gift theory was not involved in the trial court.

I find the Appellate Division's conclusion in the following quotation: (Bata *v.* Bata, 108 N. Y. S. (2) 659, 660-1)

> "The so-called agreement of sale dated May 10, 1931, and the will of Thomas Bata dated May 19, 1931, appear to have been designed chiefly, as Mr. Justice Schreiber has said, for tax purposes. The alleged oral agreement between the two Bata brothers appears to have had the same motivation."
>
> "* * * We hold that the trial court correctly penetrated the fiction which was erected, whether for tax purposes or otherwise, and determined rightly that title to these 826 shares of Leader A. G. passed to plaintiffs."

Certainly, this language is not a fair indication that the legacy theory was decided in the New York Appellate Division. I say this particularly because plaintiffs admittedly argued that the sales legacy issue was not properly raised for the first time on appeal, and it is not clear that the court rejected their contention. This is important

because plaintiffs have the burden of showing that the issue was decided.

In any event, since there was an appeal to the highest court, it is vitally important to determine what the Court of Appeals decided. These are the important conclusions of that court (Bata *v.* Bata, 145 N. E. (2) 672):

"• • • Marie and Tom [plaintiffs] claim the shares as statutory heirs, or, in civil law, the 'universal successors', of Thomas. Jan's [defendant] claim has varied. He first asserted an oral contract with Thomas, as to which the courts below have decided adversely to him, and we are of course bound by such findings. He then claims that by virtue of two documents—an alleged written contract dated May 10, 1931, and an alleged will dated May 19, 1931—as well as the subsequent conduct of plaintiffs, he is now the owner of said shares." (Page 673)

"• • • and appellant concedes that the only real question here presented is whether or not there is evidence to sustain the unreversed Special Term findings, the findings made by the Appellate Division and the disposition based thereon." (Page 673-4)

"• • • The Appellate Division also found that there had been no actual sale, oral or written." (Page 675)

"• • • Both lower courts have found that neither the May 10th writing nor the will constituted a valid, enforcible contract under Czech law." (Page 677)

"Since the written contract of May 10, 1931, was held invalid by the courts below under the Czech law, the estate had no legal claim against Jan. And, although the holographic will was valid under Czech law, yet, since it disposed of a non-existing asset only, Thomas Bata's estate devolved according to law to his widow and son by way of intestacy. It follows that, subject to the payment of debts and legacies, plaintiffs became the owners of Thomas's estate as a matter of law. The only remaining ques-

tion is whether the Leader shares in suit were transferred to Jan by any acts of Marie and Tom thereafter." (Page 677)

"Upon the record as it comes to us, Marie and Tom had the better right to the shares in suit (Clark v. Mosher, *supra*)." (Page 678)

It is apparent from the quoted language that the New York Court of Appeals agreed that the testator did not contract either orally or in writing to sell his business property. While I believe defendant raised the sales legacy issue in the Court of Appeals, that issue was certainly not explicitly decided. But plaintiffs argue that the court decided that there was no testamentary disposition and thus there was a decision on the legacy theory. Plaintiffs say it is the substance of the claim and not the nomenclature which controls. I agree but this does not dispose of the matter.

As I read the Court of Appeals' opinion the case was finally and basically decided on the ground that no contract of sale was proved and plaintiffs were not estopped to claim the shares in question. Thus, the court said that "both lower courts find that neither the May 10th writing or the will constituted a valid, enforcible contract under Czech law". But the court did not consider whether either created a legacy as opposed to a contract of sale. A finding here that the will created a sales legacy in favor of defendant would not be inconsistent with the determination of the New York Court that no oral contract or confirmatory written contract existed. I believe that some direct mention of sales legacy or the substance of that contention would have appeared in the Court of Appeals' opinion had it been an issue which that court felt called upon to determine. The Dutch decision explicitly passing upon the sales legacy issue was admittedly submitted to the New York Court of Appeals by defendant. Yet it is not even mentioned in the opinion. Certainly there

would have been some mention had the New York court felt that it was deciding the point to the contrary.

It is true that the court said that the will "disposed of a non-existing asset only". But assuming that the court did not consider the sales legacy issue properly before it, this conclusion necessarily followed from its decision that there was no contract of sale. The statement was a necessary premise to its conclusion that Tom and his mother took as intestate heirs. Had the court made the statement after considering whether the will contained a legacy to Jan, a different result would follow.

I conclude that the New York Court of Appeals did not determine the issue of sales legacy. It follows that the New York judgment forms no basis for here concluding that under the doctrine of collateral estoppel this court is foreclosed from considering the sales legacy issue on its merits.

Dutch Judgment

Since it would require this court to find, without considering the merits, that a sales legacy was created in Jan's favor, I turn next to defendant's contention that the Dutch court's finding of sales legacy must be given collateral estoppel effect in this action. Preliminarily, it is not disputed that defendant has the burden of sustaining this affirmative defense.

But considering the various contentions it will be helpful to state just what I believe the highest Dutch court decided in the Bata case here relied upon by defendant.

For our purposes we can say that the Dutch action was commenced by the present plaintiffs and defended by the present defendant. Plaintiffs there sought, *inter alia*, possession of certain shares of the Dutch Bata Company. The defendant also claimed title to such shares.

The Dutch trial court found both an *inter vivos* sale and a sales legacy. The Court of Appeal in Holland concluded that while there was no *inter vivos* sale there was a sales legacy. Considering the sales legacy in conjunction with other facts it concluded that the property should be delivered to the defendant. The Supreme Court of the Netherlands—reviewing questions of law only—overruled plaintiffs' allegations of error. The Court of Appeal's finding on Czech law was a finding of fact.

To understand what was decided it is necessary to review the basic conclusions of the Court of Appeal because they were deemed to be decisive.

The Court of Appeal first ruled that under the "evidence" it was proved that Thomas Bata (testator) intended that the shares he owned should pass without reservation into the ownership of defendant (Par. 40). The all pervading ultimate influence of this finding is evident from the decision. The court decided that the evidence failed to support an oral purchase agreement between the testator and defendant. The court then ruled that the codicil (will) contained a sales legacy in favor of defendant (Par. 61) which he had accepted (Par. 69). Under civil law the court would then normally hav been called upon to decide whether there was a legally valid transfer which would under the circumstances have resulted in "ownership" being in Jan. Instead, the court determined:

> "• • • that in any case, regardless of the manner in which Jan Bata [defendant] obtained possession of the shares now at issue, he has since become owner of these shares in virtue of Para. 1466 A.B.G.B." (Par. 81 in Supreme Court opinion).

Paragraph 1466 of the Czech Code creates the doctrine known as acquisitive prescription. It provides as follows:

"He who has legal possession of a moveable thing for three years becomes the owner thereof by prescription."

Clearly the Dutch court did not declare Jan to be the owner of the Dutch stock on the ground that the will created a sales legacy in his favor which he had accepted and which had been legally transferred to him. Rather, under its acquisitive prescription determination the court used its sales legacy determination as the basis for finding that Jan had a legal claim or title, a necessary element in determining that acquisitive prescription was present. However, Jan also had to prove rightful possession under that doctrine.

Although their decision made it unnecessary to do so, the court went on to give its views as to certain other legal contentions. It is unnecessary to repeat them.

With this background I now consider the defendant's contention that since the sales legacy issue here involved was admittedly finally determined in defendant's favor by the Dutch court in an action between the same parties involving the same issue (effect of the May 1931 papers), although in connection with different property, this court must under the doctrine of collateral estoppel give binding effect to that determination.

Parenthetically, I shall assume without deciding that the Dutch court's determination of "sales legacy" is an ultimate fact for purposes of applying the collateral estoppel doctrine. It will be noted that it was a finding used to fulfill the "legal claim" requirement for acquisitive prescription. Compare 2 Freeman on Judgments (5th edition), § 690; Bigelow on Estoppel (6th edition), Chap. III, § 3 at p. 176, *et seq.*

Plaintiffs contend that the Dutch determination is not entitled to binding recognition or respect as a finding that the May 1931 papers contained a sales legacy in favor of defendant for the following reasons:

I. The Dutch Court completely disregarded the prior New York judgment and Swiss decision. Certain other miscellaneous facts are also discussed under this head.

II. The Dutch judgment conflicts with the New York judgment which must be given priority and conclusive effect under the Full Faith and Credit Clause of the United States Constitution.

III. Even if the Dutch judgment were given recognition in this court, it should be given no greater effect in Delaware than it would have in Holland, where it would have no collateral estoppel effect as sales legacy.

IV. The Dutch judgment should not be given recognition as a matter of Delaware internal law because Holland gives no recognition to Delaware judgments. Rather, the Dutch determination should be examined in the light of the facts to see what effect, if any, should be given it.

I shall consider the contentions of plaintiffs in order.

I. The plaintiffs first argue that the Dutch courts disregarded the New York and Swiss determinations, both of which were before them. It is certainly true that except for some passing reference to the New York action in the decision of the Dutch trial court, the Dutch courts, at least insofar as their elaborate opinions are concerned, ignored the Swiss and New York determinations. From this fact as well as the general approach of the Dutch court, I infer that they did not give factual or legal weight to either. Was this of significance?

Plaintiffs do not appear to suggest that the Swiss trial court determination, which was before the Dutch court, was of prime importance in the Dutch action. I therefore do not consider the point further under this head of the argument.

Plaintiffs next assert, as is the case, that the conduct of litigation and of a trial in Holland is very different from that in the United States. But plaintiffs do not assert that it is so different as to preclude a fair trial and so I need not spell out and evaluate the Dutch procedure or consider this matter further except to note that both parties agree that the factual and legal presentations in Holland were not nearly so complete as here. Parenthetically, parties and their relatives are not heard in Holland as a matter of internal law.

Plaintiffs state that the Dutch Court of Appeal committed error in making findings concerning the applicable Czech law (true to some extent); that it did not have certain evidence before it (true also); and that it showed a determination to reach a result opposite to that arrived at in New York (not proved).

Plaintiffs point to what I find was an intemperate and unretracted attack by defendant's Dutch lawyer in the Dutch court upon the American courts, the New York trial judge and plaintiffs' American counsel (their New York counsel in this action).

Plaintiffs further correctly point out that defendant's lawyer argued to the New York Court of Appeals that the issues and record before the Dutch District Court and the New York Court were the same.

What do such of the foregoing facts as I have found to be true, prove in this case? Plaintiffs say they affect the credibility of one of defendant's Dutch witnesses and show inaccuracies in defendant's brief in this court. But plaintiffs do not contend, at least under this head of their brief, that such facts alone or in combination should be the basis for denying collateral estoppel effect to the Dutch judgment if that principle is otherwise applicable. It is therefore not necessary to give further consideration to these facts under this aspect of plaintiff's argument.

II. Plaintiffs' second reason why the Dutch judgment should not be recognized is that the Dutch judgment con-

facts with the New York judgment which must be given conclusive effect under the Full Faith and Credit Clause.

Plaintiffs insist that in at least eight respects the Dutch judgment is in conflict with the New York judgment. I shall state and discuss plaintiffs' contentions separately.

1. Plaintiffs first point out that the language of the New York Court said that the will "disposed of a non-existing asset only". Whereas, according to the Dutch court the May 1931 documents contain a sales legacy in defendant's favor for all the shares of the testator. From this plaintiffs contend that the New York court decided that the will contained no legacy to defendant, while the Dutch court held to the contrary.

As I have already concluded in discussing the effect of the New York judgment, the New York court's language does not constitute a holding that there was no sales legacy. That issue was not decided by the New York court. It follows that the New York and Dutch judgments are not inconsistent on this issue.

2. Plaintiffs next say that the Dutch judgment is that the two May 1931 documents were drawn to evidence the purpose of Thomas "to place the ownership of the concern founded by and belonging to him, into Jan's hands without any reservation, after his (Thomas's) death". Whereas, the New York judgment was that the two documents were a fiction which was "designed * * * chiefly for tax purposes" (Appellate Division). The Dutch Court of Appeal specifically rejected plaintiffs' argument that evasion of death duties by fictitious acts was the purpose of the May 1931 documents (Par. 41).

Certainly the Dutch court rejected the contention that the May 1931 papers were designed to evade taxes. The New York court said the papers appear to have been designed chiefly for tax purposes. But the New York

court did not state a conclusion which can be said to be absolutely contrary to the findings of the Dutch court. Moreover, the Dutch court's finding was in connection with "sales legacy" while the New York finding was made in resolving the issue of equitable estoppel. The best that can be said is that, while not necessarily inconsistent, the findings have an "aura" of incompatibility.

Thus, assuming without deciding that the facts are of a character which would warrant the application of the collateral estoppel doctrine, I must conclude that they are not clearly inconsistent and thus the New York judgment need not be accorded priority on that ground.

3. Plaintiffs contend that the Dutch judgment contains a finding that payment of the purchase sum was made by defendant, whereas the New York court decided that defendant never made payment of the purchase sum. The New York court made its determination on this point in connection with its disposition of the defense of equitable estoppel while the Dutch court made its findings in connection with the argument of plaintiffs that there had been no acceptance of the sales legacy.

The conclusions are inconsistent but they were not made or used in connection with the issue of the existence of a sales legacy and so do not directly touch the present collateral estoppel problem.

4. Plaintiffs say that the Dutch judgment determined that, in connection with the estate proceedings in Czechoslovakia, the "declarations and acknowledgments" of plaintiffs in the June 22, 1933, "record" had "dispositive significance". The New York finding was that they could not form the basis of an equitable estopped under the circumstances. Clearly the finding was used by the two courts to dispose of different issues. It is certainly true, however, that the courts gave different legal effect to the declarations made by plaintiffs in the estate proceedings.

5. Plaintiffs assert that the Dutch court incorrectly stated that the deed of delivery transferred to the heirs only the property therein listed, whereas the New York court held that under Czech law by such a deed all of the estate passes to the heirs subject to legacies and debts. Although the matter is cloudy, plaintiffs' contention appears to be true. Although its effect on the court's ultimate decision is a matter of speculation, I am inclined to think the Dutch court would have reached the same result even though it had recognized the correct Czech law on this point.

6. The Dutch and New York judgments certainly are in conflict as to the approximate value of the estate (Holland about $8,000,000; New York between $30,000,000 and $45,000,000). However, these findings do not appear to have been used in connection with the sales legacy finding.

7. The Dutch judgment is that defendant promptly claimed absolute ownership whereas in the New York decisions it is concluded that defendant made no such claim before 1939 because he did not treat the property as his own until after 1939. The courts appear to have arrived at different conclusions on this point. However, once again the findings were made in connection with the determination of different issues.

8. The Dutch judgment was that defendant was in possession of the shares concerned under a claim of right whereas the New York court held that defendant never had possession of the shares concerned under a claim of right. Whether these holdings can be said to refer to the same property is not entirely clear and so I am unable to conclude that an inconsistency exists.

Thus, it appears that the New York and Dutch judgments reached inconsistent conclusions as to the following:

(1) Whether or not the purchase sum of the sales legacy was paid by defendant.

(2) Whether the June 22, 1933, declaration had dispositive significance.

(3) The effect of the Deed of Delivery under Czech law.

(4) The value of the testator's estate.

(5) Whether or not defendant claimed absolute ownership before 1939.

Defendant says these inconsistent issues are at best concerned only with "merely evidentiary or mediate facts" and under the doctrine of collateral estoppel are not binding a subsequent action. Plaintiffs do not suggest that the New York "facts" identified above are entitled to collateral estoppel effect in Delaware. See "Restatement of the Law of Judgments", (1948 Supp.), § 68(p); 142 A. L. R., p. 1243; 152 A. L. R., p. 1193. Consequently, since this court would not be bound by these evidentiary findings of the New York court under the doctrine of collateral estoppel there is no reason why this court should attach any decisive significance to the fact that the Dutch court did not give such findings conclusive effect. However, the Dutch court's action in some areas of factual difference is of some importance in deciding what effect should be given its sales legacy determination.

Before turning to plaintiffs' remaining contentions some preliminary discussion of the effect to be accorded foreign determinations is in order. There is apparently no treaty and there is no Federal law or Delaware statute touching upon the effect to be given foreign judgments or determinations by the courts of Delaware. Nor do I believe the matter is governed by "national" law. The effect, if any, is therefore to be determined as a matter of state judicial decision.

The Delaware Supreme Court has said by way of dictum that foreign judgments are to be recognized, if at all, under principles of comity. See Iowa-Wisc. Bridge *v.* Phoenix Finance, 2 Terry 527, 25 A.(2) 383. This often criticized term merely means that Delaware is free to adopt whatever rule it desires with respect to the effect to be given foreign judgments. See 2 Beale, The Conflict of Laws, § 433.1; 434.1.

I emphasize that the so-called *res judicata* as opposed to the collateral estoppel aspect of the matter is not before this court. It is important to note this fact because the American courts which have given binding effect to foreign judgments have generally been called upon to consider the matter in a *res judicata* context. For example, the leading American case on the doctrine of "reciprocity", Hilton *v.* Guyot, 159 U. S. 113, 16 S. Ct. 139, 40 L. Ed. 95, dealt with an action in this country to enforce a French judgment.

III. Plaintiffs first contend and defendant tacitly agrees that before the Dutch determination of sales legacy can have collateral estoppel effect in Delaware it must be shown that Holland would give that effect to its own determination. This is a prerequisite to the application of the collateral estoppel doctrine even in connection with American judgments. Palmarito, etc. *v.* Warner, 232 N. Y. S. 569.

Plaintiffs argue that in a later action in Holland between the same parties or their privities the Dutch court will consider its determination in an earlier action between the same parties binding if, in both actions, only the same issues are presented. Defendant says the Dutch doctrine applies to any material determination even though the later action also involves different issues. In view of my general approach to the recognition of Dutch determinations in a collateral estoppel context, I do not find it

necessary to reach a conclusion with respect to this difficult point. I shall assume without deciding that defendant's version is correct and that in a later proceeding between these parties involving a different cause of action but the same transaction the Dutch court would consider its previous determination of "sales legacy" binding. Thus I shall assume that this prerequisite to the application of the collateral estoppel doctrine is present.

IV. Plaintiffs argue that determinations of foreign countries, at least those which do not give automatic effect to American (Delaware) rulings having collateral estoppel import, should be examined in each case to determine if, and to what extent, Delaware will give effect to them.

Defendant contends that Delaware should give collateral estoppel effect to the Dutch determination of sales legacy as though the determination had been made by a sister state. Defendant says that this should be done without regard to the effect which a Dutch court would give to a Delaware determination.

There is scant American authority dealing with our problem, which, I emphasize, involves collateral estoppel and not *res judicata*. The only mention of our problem of collateral estoppel in the foreign judgment field which I could find appears in a law review article by Professor Reese. "The Status in This Country of Judgments Rendered Abroad," 50 Col. L. R. 783, 789. He cites three cases in support of his statement that "• • • so far as appears, determination of a particular issue by the court of a foreign country will be held binding on the parties over here in any further litigation that may ensue between them." They are Newton *v.* Hunt, 112 N. Y. S. 573, mod. on other grounds, 119 N. Y. S. 3, aff'd. 95 N. E. 1134 (appears to give collateral estoppel effect to English determination, although the discussion is limited); *cf.* Gould *v.* Gould, (N. Y.) 138 N. E. 490 (more nearly *res*

judicata); and see Baiz *v.* Coro and L. V. R. Imp. Co., (N. J.), 101 A. 395 (not a true collateral estoppel situation). However, neither the author's work nor the cases cited by him contain any adequate discussion of this most challenging problem.

The Restatement of Conflict of Laws (§ 2 and § 450) would appear to give collateral estoppel effect to determinations of foreign countries. However, it has been suggested by high authority that there are compelling reasons for treating separately the rules governing interstate and international conflicts of law. See Ehrenzweig, Interstate and International Conflicts Law, 41 Minn. Law Rev., p. 717. Professor Reese shares this view. 41. Minn. Law Rev., p. 717, n. 4.

Of course the fact that these men feel that international conflicts (which would of course embrace the effect to be given in Delaware to foreign determinations) should be treated separately from interstate conflicts does not mean that the rules should necessarily be different. However, they indicate that the important factors may not be and in my opinion are not always the same.

I think it is important first to determine whether Delaware should give collateral estoppel effect to the Dutch determination of sales legacy without regard to the treatment which would be accorded Delaware determinations in Holland. In resolving this issue it may be helpful to consider the reasoning of the cases dealing with the applicability of *res judicata* to foreign judgments. With exceptions not here involved, most American courts and authors who have considered the problem have apparently approved the rule giving *res judicata* effect to foreign judgments without regard to the effect accorded such American judgments by the country whose judgment is sought to be enforced. See 50 C. J. S. Judgments, §§ 904, 906(a); 2 Beale, The Conflict of Laws, § 434.3. Gioe *v.* Westervelt, 136 F. 1017; Cowans *v.* Ticonderoga Pulp

219 N. Y. Supp. 284. The reasoning of these authorities varies. Some emphasize that there should be an end of litigation. Others say that the foreign judgment establishes an independent obligation. In England it is said that a foreign judgment, duly rendered, establishes an obligation which the courts of that country should enforce. See Berry *v.* Shead, 7 N. S. W. R. 39 (1889).

In contrast, a minority of American courts have adopted the view that foreign judgments are only *prima facie* evidence where used as a basis for action or defense in an American court.

The only Delaware expression of the effect to be given foreign judgments is found again by way of dictum in the 1842 Superior Court opinion in Pritchett *v.* Clark, 3 Harr. 517, where the court, in dealing with a Pennsylvania judgment sought to be sued upon in Delaware, said (p. 523-4):

> "Independently of the constitution and laws of the United States, it is not disputed that the judgments of the several states would be regarded only in the light of foreign judgments by the tribunals of any other State; and would be, at most, only *prima facie* evidence of the debt or promise. The merits would be fully open to examination on a plea of the general issue, which would be *nil debet* or *non-assumpsit*, and not *nul tiel* record."

This view was also stated in the Chancellor's dissent (the later spoke for the majority) in the old Court of Errors and Appeals, 3 Harr. 241, 259. It should be mentioned that the subject matter of the dictum in this old case was not a matter of dispute in the Superior Court or the upper court. This view that the foreign judgment is at most only *prima facie* evidence is admittedly contrary to the majority American view and the view of one of the leading American authorities in the conflicts field. See 2 Beale,

The Conflict of Laws, § 434.3. The reasoning of the cases adopting the *prima facie* view is that it is an encroachment on state sovereignty to give binding effect to foreign judgments and that if they are to have such effect it should be a matter of international agreement.

I shall assume without deciding that the dictum of the Pritchett case (dealing with *res judicata* and not collateral estoppel) would not be adopted today as the Delaware law governing the effect to be given foreign judgments. Even so, can it be said that the reasons advanced for according *res judicata* effect to foreign judgments apply with equal force to the recognition to be given the determination of issues by a foreign court in a different cause of action between the parties (collateral estoppel)? Certainly, the desire to bring litigation to an end has merit. Compare Niles *v.* Niles, (Del. Ch.), 111 A.(2) 697. But as Judge Learned Hand said by way of critical dictum in an American judgment context:

> "• • • it [collateral estoppel] often works very harshly inexorably to make a fact decided in the first suit conclusively establish even a fact 'ultimate' in the second suit". The Evergreens *v.* Nunan, 141 Fed. (2) 927.

Indeed, the automatic recognition of foreign judgments often forces a most distasteful duty upon the court. Compare Güde *v.* Westervelt, 116 Fed. 1017.

Since collateral estoppel is a judicially created rule designed primarily to expedite the administration of justice, it is obvious that where it need not be automatically applied, it should not be so applied when to do so would dignify form at the expense of substance.

It should be noted that an automatic application of the collateral estoppel doctrine to foreign judgments can result in according binding effect to one foreign court's determination although there is a later contrary determination by

another foreign court. This can happen because collateral estoppel only applies where, as heretofore noted, the court rendering the first determination will itself thereafter give conclusive effect to its own determination. Some foreign courts give such effect (Holland we here assume), while others do not (Switzerland). Thus the binding effect is made to depend upon a factor having no bearing upon the relative merits of the two determinations. If it be said that this same possibility exists with respect to determinations of sister states, I answer that the probabilities are much greater in international situations. I say this because most of our states recognize collateral estoppel whereas most continental countries seem not to apply a similar doctrine. Compare Millar, The Premises of the Judgment As *Res Judicata* In Continental and Anglo-American Law, 39 Mich. Law Rev., p. 1.

In contrast to collateral estoppel, there is more reason to give *res judicata* effect to the judgment of a foreign country, because the foreign court, assuming it had jurisdiction of the type we would recognize, has rendered a decision with respect to a matter which is, by definition, the same as that involved in the second action. Thus, there is persuasive reason to give effect to the determination of a court of a foreign country where it clearly had jurisdiction (in the American sense) and where justice in that country was administered on what we would call a "civilized" basis. What about collateral estoppel?

It is no answer here to say that the plaintiffs selected the foreign forum. Plaintiffs had to bring the Dutch action or see the defendant obtain possession of 202 "new" shares plus dividends of the Dutch Bata Company. The property was located in Holland although neither plaintiffs nor defendant was located there. The certificates and dividends involved were matters subject to the jurisdiction of the Dutch court and their rights thereto could only be finally established in Holland.

As in this case, the controlling law may not be the law of the country where the former action is commenced. Indeed, the findings as to foreign law by the Appeal Court were facts which could not be reviewed by the Supreme Court of the Netherlands. Moreover, a party may properly be held to be bound by the determination in particular litigation but it may be far from equitable to suggest that merely because he desires to assert a claim he may lose the benefit of other determinations in his own favor—a possibility under defendant's contention. Nor do the equities of the situation dictate that the matter should be resolved by a race to determine which court will decide the matter first. After all the heirs filed the Swiss and New York actions before they filed the Dutch action.

The litigation history of the over-all controversy between these parties points up some of the inequitable consequences which might flow from an automatic application of the collateral estoppel doctrine to determinations of foreign countries. This is particularly true in the cases of countries which do not give similar effect to American judgments.

In the replevin action in New York between these parties over some of the Leader shares, the court determined that the May 1931 papers did not create an *inter vivos* contract. In a later Dutch action between the same parties involving different property of the Bata enterprise the New York determination was brought to the attention of the Dutch court for the purpose of treating it as an established fact in the Dutch action. However, it is a fair inference that the Dutch Court of Appeals refused to give the determination that effect, or indeed, any effect, even though the judgment was then final in New York. The Dutch court proceeded to evaluate and determine the *inter vivos* agreement issue on the merits.

It is true that the Dutch court concluded, as did the New York court, that the papers did not prove an *inter*

vivos agreement. However, the vital point is that the Dutch court clearly felt free, had the facts in their opinion warranted it, to reach a determination contrary to that reached on the issue by the New York court. This was an implied rejection of any theory of collateral estoppel. Had the Dutch court reached a different conclusion (as the trial court in fact did), would it have served the cause of justice and equity for another American court, in a later action, to give collateral estoppel effect to the Dutch determination on that issue? I think not, and this is said without regard to any Full Faith and Credit implications.

Defendant points out that where the same issue is decided by two courts, the later decision will be given effect. He says this applies to foreign judgments as well as domestic judgments citing Ambatielos *v.* Foundation Co., 116 N. Y. S. (2) 641. It will be noted that the Ambatielos case involved *res judicata* and not collateral estoppel. Since I have ruled that the "sales legacy" issue was decided in Holland but not in New York the priority issue is not directly presented.

I should note that the contention covering the priority of the later declaration has more persuasiveness in the domestic judgment field. However, it has many inherent deficiencies when sought to be applied to the collateral estoppel aspect of foreign determinations. I can fully understand why the later of two determinations is binding when it is made by another American state. I say this because the second court presumably has decided the matter with due regard to the Full Faith and Credit Clause of our Constitution which requires it to give collateral estoppel effect to a judgment of a sister state, if the sister state gives such effect to its own determinations. This protection is not afforded a litigant where the later judgment is rendered by a foreign country which is not obligated to give collateral estoppel effect to a judgment of an American state. Nor is there any court which can make it do

so. It is not a conclusive answer to say that perhaps in that situation the court would give preference to the domestic determination.

This court recognizes that mere provincialism should not be the basis for formulating a rule fixing the effect to be given determinations of issues by foreign courts. However, the court also recognizes that, without regard to the nationality of a litigant, his rights in an American court should not be circumscribed by the automatic application of conclusions reached by foreign courts without regard to the circumstances. It might be added that this is even more true where that foreign court is not even applying its own substantive law and is determining the issue collaterally.

I therefore conclude that Delaware will not give automatic collateral estoppel effect to the sales legacy determination of the Dutch court but will examine the circumstances to see if and to what extent, it will give effect to such determination by the Dutch court. However, plaintiffs seem to concede that binding effect should be given the Dutch sales legacy determination here, if Holland would give similar effect to a Delaware determination—the so-called reciprocity rule. I shall rule on the reciprocity point but in doing so I shall assume without deciding the collateral estoppel will be applied if Holland would give "automatic" recognition to a Delaware determination, *i. e.*, apply the same tests.

Does Holland give collateral estoppel effect in its court to foreign determinations in the same way our American courts do with respect to determinations by other American courts?

Plaintiffs say that the Dutch court is free as a matter of Dutch law to decide in each particular case whether or not it will give binding effect to a foreign judgment. Defendant argues that plaintiffs have not sustained the burden of showing "that the Dutch law does not permit

reciprocal effect to Delaware judgments". Let us see what the Dutch cases have decided.

The Supreme Court of Holland held in the so-called Fur Coat Case (Nov. 14, 1924, PT-1342)[3] that Section 1954 of the Code does not apply to foreign judgments. Thus, there is admittedly no Code provision applicable to the problem. The court also said, "• • • that the effect of *res judicata* does not apply in the Netherlands to a foreign judgment • • •". The court went on to approve the rule "that the Netherlands courts must examine in each individual case whether and to what extent they are to accord authority to a foreign judgment • • •". The court announced a judicially created rule to fit that case, saying:

> "• • • since, it having been established that the appellants [a Dutch partnership in liquidation] quite voluntarily sought judgment from an English court and were bound thereby in good faith and equity, it must be held, in agreement with the Court of Appeal, that the Netherlands courts must only set aside such a judgment if it conflicts with the Netherlands principles of public policy, of which there has been no evidence in this case;"

In the Hungarian Mortgage Case the Supreme Court of Holland adopted what is now the law of Holland:

> "• • • none of the statutory provisions cited prevents the authority of a Netherlands court to judge in each particular case under due regard of Netherlands principles of public order, whether and in how far authority should be accorded by it to a foreign decision;" (June 24, 1932, D-1861).

[3] In the discussion, particularly of the foreign law, the court for the subsequent convenience of counsel has given the pertinent exhibit number. The numerals in parentheses refer to the transcript page number.

The New York Separation Decree case decided by the District Court of The Hague, December 21, 1949, (D-1862) can be said to stand for the fact that the court there gave collateral estoppel effect to a foreign determination. Apparently that case was not appealed.

Later in the so-called Younger Swiss Child case, the Supreme Court of Holland, (April 1, 1938, PT-1430) stated that Section 431 of the Code of Civil Procedure which, with exceptions not relevant, prohibit the enforcement[4] in Holland of foreign judgments, is inconsistent with any obligation on the Dutch court to give automatic effect to foreign judgments. The court said, however, that the Section, "* * * does not rule out the competence of the Netherlands courts to examine in each individual case, whilst respecting the principles of Netherlands public policy, whether and to what extent they should accord authority to a foreign judgment, * * *". Of course, defendant here does not seek to enforce the Dutch judgment but he does seek binding effect for it to the extent it determined that a "sales legacy" was created by the testator. In this connection it is important to emphasize that the Dutch court said in the Younger Swiss Child case that the same Code provision was "incompatible with any obligation * * * to pronounce judgment because the foreign court has done so or to base their judgment on certain facts solely because the foreign court has held those facts to be correct in its judgment".

Based upon the evidence adduced I conclude that under Dutch law the Dutch courts are not bound in law to give binding effect in whole or in part to a foreign judgment. I speak, of course of a rule of automatic application comparable to our collateral estoppel rule.

In view of the foregoing decisions the defendant concedes that Holland does not have a code rule of *res judi-*

[4] The use of the word "enforcement" seems to limit the applicability of the statute to suits in Holland on foreign judgment.

cata or collateral estoppel applicable to foreign judgments. He argues, however, that under a judicially created rule Holland will give binding effect to a foreign judgment under some circumstances and that plaintiffs have failed to sustain their burden of showing that under Dutch law binding effect would not be given to a Delaware determination, citing Kessler *v.* Armstrong Cork, 158 Fed. 744 (there was no offer in this case to prove the foreign law concerning foreign judgments); Gull *v.* Constam, 105 F. Supp. 107 (held that absence of reciprocity must be pleaded by one relying upon it).

Plaintiffs contend that their showing that foreign determinations are not automatically recognized in Holland is sufficient to prevent any finding of reciprocity of the type sufficient to justify this court in automatically giving collateral estoppel effect to the Dutch determination.

I conclude that Holland would after reviewing each case grant conclusive effect to some Delaware determinations. Compare The Hungarian Mortgage Case (June 24, 1932, D-1861) and the New York Separation Decree Case, (December 21, 1949, D-1862). It is also true that a leading Dutch legal writer has stated that binding effect will be given foreign judgments in his opinion unless they violate the Netherlands public order (D-1863). But the area of judicial discretion is not so explicitly defined by the Dutch courts that one could say with assurance what would come within the Dutch court's concept of "public order". It is thus akin to our nebulous term "public policy". See DuBois, The Significance In Conflict of Laws of the Distinction Between Interstate and International Transactions, 17 Minn. Law Rev., p. 361, 378. Moreover the Dutch court's verbal formulation of its rule in the Younger Swiss Child case (PT-1430), as hereinbefore quoted, suggests very strongly that Netherlands public policy is not the only limitation upon the recognition to be accorded foreign judgments. It will be noted that its recognition must per-

haps be preceded by a determination that the proceedings leading up to the judgment were in keeping with the Dutch court's notion of justice. See The Hungarian Mortgage case, above. And this idea seems broader than our "due process" concept.

The effect to be given a foreign judgment by the Dutch court thus appears to be a matter of discretion with the court and it was presumably on this basis that the Dutch court ignored the New York Bata decision in determining whether or not an *inter vivos* agreement existed. Where the recognition of a foreign decision is in the area of court discretion, it is difficult to apply the principle of collateral estoppel.

I conclude that under Dutch law the Dutch courts are not bound as a matter of law to give binding recognition to foreign judgments or foreign determinations of issues in an area equivalent to our own application of the doctrine. Rather, under judicially created principles, the recognition to be given is found in the exercise of judicial discretion. This appears to include a determination that the proceeding leading to the judgment was in keeping with the Dutch court's notion of justice. See The Hungarian Mortgage case, above.

But is collateral estoppel effect to be accorded the Dutch determination merely because Holland may after reviewing the facts give binding effect to some Delaware judgments? I think not.

If the reciprocity doctrine is to apply in a practical way, particularly in the collateral estoppel field, it is obvious that the foreign court involved cannot be free as a matter of law to "pick and choose" which foreign judgments will be accorded binding effect based upon non-jurisdictional considerations.

Defendant argues that plaintiffs failed to sustain their burden of establishing the "absence of reciprocity in the foreign law." Defendant does not spell out precisely what

he would require plaintiffs to show here. I gather he contends that plaintiffs must show a negative, but what that negative would involve is not made entirely clear. In any event, plaintiffs were not required to prove that reciprocity would not be accorded in any case. I say this because "reciprocity," as I understand it, assumes that, subject to limitations inherent in the recognition of all foreign judgments, a Delaware determination would automatically be given binding recognition in Holland and the Dutch court would not be permitted, as it now is, to determine "whether and in how far authority should be accorded by it [Dutch court] to a foreign decision", The Hungarian Mortgage case, above.

I therefore conclude that to the extent plaintiffs have any burden, they have sustained it by showing that the Dutch court would not automatically (subject to jurisdictional and related limitations) accord binding effect to Delaware determinations.

I further conclude, for the reasons given above, that the principle here announced should apply in the collateral estoppel field even though, as here, the plaintiffs (both here and in Holland) are not United States citizens, and although they were also plaintiffs in the Dutch actions. It follows that even if the reciprocity test be controlling, the Dutch determintaion of sales legacy should be given no greater weight in this action than the Dutch court would grant to a Delaware determination, viz., evaluate it in the light of the circumstances to see what effect, if any, should be given it. That approach will be adopted here.

One pertinent circumstance is the determination of the Swiss intermediate appellate court which I now consider.

Plaintiffs do not claim binding effect for the determination of the Swiss Superior Court (final appellate court on questions of fact) because they concede that it would not be a binding sale legacy determination in a later action between the parties in Switzerland to determine

ownership. However, they say it is of great persuasive weight particularly because defendant relied upon Swiss authority to support his sales legacy argument and because it involved the very situation which is before this court.

The Swiss declaratory judgment action was brought by the heirs against the Swiss mandatories asking, *inter alia*, that they be directed to recognize the right of the heirs to give orders to them as successors to Thomas in the mandate relationship. Jan was permitted to intervene and he did so and took over the defense of the action. Under Swiss law applicable to the form of action involved, Jan could not assert his own claim to ownership affirmatively but he could do so negatively in the sense that he could and did say that plaintiffs had no standing to sue because the mandator aspect of the mandate relationship passed to him pursuant, *inter alia*, to a sales legacy left by Thomas.

I find that the Appellate Court of Switzerland, by entering judgment for plaintiffs, necessarily rejected defendant's argument that plaintiffs had no standing to sue because he (Jan) had, by a sales legacy from Jan, become the successor mandator. The court announced its decision but has not yet filed its promised opinion. This court can no longer defer its decision on that ground. While the defendant can, by further appeal, attack the decision to the extent it is based on Swiss law, the intermediate appellate court's determination of the Czech law applicable to the sales legacy claim cannot be further appealed. Of course, if certain of the Swiss law points were reversed (*e. g.*, whether the mandate relationship survived Thomas' death), it might be argued that the sales legacy ruling by the intermediate appellate court was legally unnecessary. However, I do not consider this too important because plaintiffs do not seek binding effect for the Swiss determination on "sales legacy" but only say that it is entitled to persuasive weight for the reasons given.

Thus the decision shows that a court with a legal system having some common ancestry with the Czech system has rejected the claim of sales legacy in this same general situation.

In the light of the Swiss decision and the other circumstances of this case, should this court in the exercise of discretion give binding effect to the Dutch determination of sales legacy? I think not for the following reasons:

1. The Swiss Appellate Court, applying Czech law, reached a conclusion with respect to sales legacy which is contrary to that reached by the Dutch Court, although it had the final Dutch decision before it.

Defendant contends in this case that Swiss law is of some persuasive importance in determining Czech law because of the background similarity of the two legal systems. Indeed, defendant placed great reliance on one Swiss case (Froelich v. Froelich, D-1808). In contrast, it is conceded that Dutch law does not have a similar relationship to Czech law. Consequently, adopting defendant's contention as to Swiss law, it follows that the action of the Swiss judges can be said to be based on a greater "feeling" for the controlling Czech law in the same general situation which is presented to this court. I say this fully realizing that the Swiss court's determination is not entitled to collateral estoppel effect here.

2. The Dutch Appellate Court ignored the New York decision and made important contrary findings of fact which "flavored" its decision. True, they were not "facts" entitled to collateral estoppel effect but they were important. However, the fact that they were ignored or rejected in their entirety tends to be a negative factor in deciding whether the Dutch determination should be accepted without consideration of the merits. After all, the New York trial came first and the record made was much more elaborate.

One finding of the Dutch court deserves particular notice because of the importance of the fact in this court's thinking. The Dutch Court found in effect that the value of the assets (about $8,000,000) was not out of keeping with the purchase price fixed by Thomas in the May 1931 papers (Par. 112). If this were true, and not even defendant contends here that it was, it is hard to understand why Thomas did not see fit to make a direct sales legacy to Jan if he so intended. After all, even under Jan's theory avoidance of estate taxes was a very real reason why he allegedly "disguised" the legacy to Jan. The tax rate to the half-brother, as opposed to that applicable to the son and widow, was not so much higher that it would be a sufficient explanation. Nor was the concealment of some aspects of his foreign assets alone a sufficient "reason" for the use of a disguise. Yet the Dutch Court found no occasion to consider what appears to this court to be an inconsistency in its opinion which is bound to be important in any evaluation of the case.

3. Some of the important principles of Czech law were not considered in the Dutch decision. I do not suggest this as a reflection on the Dutch court. I say this because it is conceded by both sides that the presentation of Czech law both in Switzerland and Holland was not nearly so exhaustive as in this court.

4. Admittedly the case on its merits was much more fully presented in this court than in either Switzerland or Holland.

Although not an independent reason, I should also note that the unwarranted (and in my opinion, unretracted) attack by defendant's Dutch counsel upon the American legal system, etc., in an attempt to discredit the New York judgment does not commend the defendant's appeal that the Dutch determination be given binding effect. I emphasize that this is not intended as a reflection on the Dutch court.

The court is aware that the reasons give above for not according conclusive effect to the Dutch determination would not be legally sufficient were the collateral estoppel doctrine applicable. But they are sufficient where, as I have found, I am free to examine the Dutch proceedings to see what effect, if any, I believe should be given them.

Having determined that the Dutch court's sales legacy determination should not be given binding effect, I now turn to the merits of the controversy.

The Merits

Plaintiff's argument on the merits goes like this: The property here involved was owned by Thomas Bata at his death or derived from property so owned; there was no *inter vivos* sale of the shares to Jan; under Czech legal proceedings (deed of delivery) the heirs became vested with title to all assets of the estate subject to a duty to pay debts and legacies; there was no sales legacy to Jan of the shares and the plaintiffs have not lost their right to assert their intestate ownership because of any events after Thomas' death. Thus, plaintiffs are entitled to the property in dispute.

Defendant concedes that it must be assumed here that there was no *inter vivos* sale and that title to the shares passed to the heirs subject to a duty to pay debts and legacies. However, he claims that the May 1931 documents considered in connection with the surrounding circumstances show an intention on Thomas' part to create a sales legacy in favor of Jan and that Jan accepted the legacy; that, in any event, on the basis of the Czech law doctrine of constitutive recognition Jan is entitled to be declared the owner of the property here involved; finally, that under the Czech law of tacit waiver or disclaimer plaintiffs are not entitled to assert their ownership. Thus, defendant is entitled to the property.

Sales Legacy

I turn first to the issue of sales legacy. I recognize that the ascertainment of the testator's intent is the objective and that the Czech "substantive" law in 1932 is controlling.

A preliminary dispute arises as to what evidence outside the will may be considered in interpreting the will. Plaintiffs say the Delaware rules of evidence control while the defendant claims that the court should consider all matters which the Czech court would have considered pertinent—a much broader rule since Czechoslovakia did not have so-called rules of admissibility. I need not decide this point in connection with the determination of the issue as to whether the May 1931 papers, when considered with extrinsic evidence, created a sales legacy in defendant's favor. This is so because I have concluded that the matter must be decided here solely by the application of a principle of Czech law to the language of the last will itself. Of course, the facts of which Thomas may be deemed to have been aware are relevant by either Czech or Delaware standards and they are important background in considering the dispute. With some duplication, I now refer to the more important facts.

Thomas was born in 1876 in Moravia, then part of the Austrian-Hungarian Empire. Later it was part of Czechoslovakia. Thomas Bata's family had been shoemakers for generations. Thomas Bata, Sr., was born of his father's first marriage. His father remarried and the defendant, Jan, who was born in 1898, was one of four children by the second marriage. Thus, Thomas and Jan were half brothers with Thomas many years his senior. About 1894, Thomas and his brother and sister by his father's first marriage commenced a partnership shoe business at Zlin (later part of Czechoslovakia). However, by 1908 Thomas had become the sole owner of the business.

Thomas married Mary Mencik in 1912 when she was 19 years of age. Mary had gone to a "Lyceum" in Vienna but had no business training. Plaintiff, Tom, was born in 1914 and was the only child of the marriage. Jan, who went to live with Thomas in 1909, continued to live there after the marriage and until he went to the United States in 1919.

In early 1918 Thomas developed a thrombosis in his leg. This was a matter of serious concern. At that time Thomas made a will dated January 29, 1918. It was accompanied by a medical certificate as to his mental and his nervous condition but not as to his physical condition. This long will had nine supplements, and its significance will be considered under another issue herein.

During the twenties and early thirties Thomas was expanding the business beyond Moravia. However, he had a highly personal but slipshod method of handling the finances of the foreign companies and their transactions with the company at Zlin. It was in 1919 that Dominik Cipera, who married Thomas' niece, became associated with Thomas in the business. Cipera was to become Thomas' "right hand" man.

Thomas took a great personal interest in young Tom's education and activities, and required that he be trained in the business from the bottom up. There is no doubt about the great affection that Thomas had for his son.

During all these years Thomas' wife, Mary, who knew nothing of commercial or financial affairs, was engaged in social welfare projects and entertaining for her husband. All of her expenses were handled through the factory at Zlin. I have no doubt that Thomas was deeply devoted to his wife.

In the years prior to 1931, Thomas relied heavily upon his relatives to assist him in the administration of the business both in and outside of what became Czechoslovakia. Thomas had permitted a very complicated system to evolve

by which profits of the foreign countries were carried in a way that made it difficult for others to know of his holdings. Large sums of money, presumably profits of foreign operations, were carried under various titles in foreign banks and were called the "Export Department" of Bata Shoe and Leather Company, Lynn. Actually, this money had no connection with the Lynn Company (an American corporation). It appears to have been used in part as a device to avoid paying Czech taxes on some foreign profits. In time Cipera came to keep the records in connection with these substantial balances.

There is no doubt that in 1931 and 1932 the Bata business was sizeable and that Thomas had plans for even greater expansion. Thomas caused the Swiss company known as Leader, A. G. to be organized. This corporation was formed on February 5, 1931, and had an authorized capital of 2,000 bearer shares. Whether delivered to him directly or not, it is agreed that Thomas was the personal owner of all of these shares. Actually, except for four qualifying shares, the shares were either delivered to Thomas personally or to the Dutch Bata Company, which he controlled. The Leader transaction was "covered up" by a fictitious pledge agreement which made it appear that the Swiss lawyers were the actual stockholders while Thomas and the Dutch Bata Company were pledgees with the right to take title at any time.

Plaintiffs state that Leader was formed for tax reasons. They say it was not done from any desire of Thomas to conceal his ownership of foreign companies, as defendant argues. I think Thomas had both considerations in mind when he caused Leader to be created. An additional reason was that Switzerland was somewhat of a financial asylum in the midst of the political and economic turmoil which characterized most European countries.

By 1931 the value of Thomas' assets at home and abroad amounted to somewhere between 1,000,000,000 K. C.

and 1,500,000,000 K. C. (from 30 million to 45 million dollars). At this same time his liabilities were negligible. Defendant does not challenge the value as here stated. While the value may have been less at Thomas' death, I do not believe it was so reduced as to bring the value in line with the amount of the "sale" price fixed by Thomas.

It was about this same time that Thomas incorporated the Czech company known as Bata, a. s. This company was located at Zlin, Czechoslovakia and employed thousands of workers. It was in or near Zlin that Thomas and the present parties lived.

Thomas Bata died in a plane accident July 12, 1932, when he was about 56 years of age. I find that at the time he was in good health and expected to continue in the business. At that time he was happily married to Mary, a woman of grace and talent but of no business experience. At the time of his father's death Tom was 17 years of age and was working for Bata in Switzerland. His father was quite obviously grooming him for leadership and indeed defendant himself so recognizes.

At the time of Thomas' death the defendant was about 34 years of age. He had been in the business for a good many years and was quite familiar with its workings and he could be said to be one of Thomas' trusted lieutenants. However, he did not "rank" some other lieutenants. The relationship between Thomas and Jan was friendly but I do not believe it compared with that which existed between Thomas and his son and wife.

When Thomas died the only key to his safe was on his person. After the key was obtained the safe was opened on the day of his death in the presence of Jan and several other trusted lieutenants of Thomas (young Tom was then in Switzerland and, of course, Mary was not present). They found a sealed envelope addressed to Jan in Thomas' handwriting. Jan opened it and found it was a memorandum of sale dated May 10, 1931. It was written entirely in Thomas' handwriting and it was signed by him twice. It consisted of two pages.

Some of those present read the document and signed their names. One of the lieutenants (Cipera) wrote on it, in ink, "in our presence on 7/12/32 opened by J. A. Bata". Apparently at the suggestion of one of those present, Jan at that time wrote on the document, "I agree and purchase, Jan A. Bata". On the next day Jan added the words, "That is to say, I agreed and purchased as per oral agreement". Although there may be some dispute about them, I find the foregoing to be the facts. When the "7/13/32" date was added by Jan I do not consider of importance under my approach.

The translated document, as it looked after the actions above described, appears as follows:

The Sale Memorandum, dated May 10, 1931:

[first page]

on 5/10 1931

I, the undersigned Tomas Bata sell
to you J. A. Bata and you purchase
from me all shares of Bata akc. spol.
Zlin as well as all shares of the construction
company "Zlin" then all shares of the
Company "Tisk" then participations in the
Libstat establishments.
Of foreign companies I sell to you
the following shares or participations:
Company, Bata Schuh Aktiengesellschaft
Zurich nominal frc. 450,000.–

Bata Matschapai	Amsterdam	51,000 Hol. fl.
Bave "	"	20,000 Hol. fl.
Bata Cipele i koze	Zagreb	2100,000 Dinars
Bata	Krakov	100,000 Zl.
Bata	Bukarest	2000,000 Lei
Bata	Alexandria	2,250 £
Bata	Copenhagen	400,000 D. Kr
Bata	Strasbourg	600,000 Frc

[second page]

Bata	Stockholm	40,000 Kr
Bata Deutsche Schuhe A. G.	Berlin	110,000 Rm.
Bata	Vienna	20,000 S.
Bata Shoe & Leather	Lynn	15,000 $
Bata "	New York	400,000 $

I sell to you shares
Further also of domestic companies

Bapoz spol. s.r.o.		400,000 Kc
Paris akc. spol		500,000 Kc
Atlas insur.		3,000,000 Kc.
Busi	Trebic	10,000,000 Kc
Budisovsky	Trebic	10,800,000 Kc

From these values ~~I exclude~~ is excluded the landed property Loucka a Lazy as well as my residential house in Zlin
Besides these enumerated values ~~included are in the sale~~ I sell to you all ~~vin~~ my property even if it is not enumerated here for the amount of Kc 50,000,000 fifty million ~~K.c.~~ Czechoslovak currency.
You are under obligation to pay this purchase price in cash within one year from taking over the companies and to pay 5% interest pro ano
7/13,32 note:

I agree and purchase; (signed) J.A. Bata (signed) Tomas Bata that is to say, I agreed and purchased as per oral agreement.

From the sold property is further excluded the debt which we have against the city in the amount of approx. 4300,000 that is by such amount the purchase price is increased and J. A. Bata is under obligation to pay such amount to the city of Zlin. (signed) Tomas Bata

A second sealed envelope was also found which had written on it in Thomas' handwriting "My last will". It was opened the following day at the official ceremony and purported to be a will in Thomas' handwriting dated May 19, 1931, consisting of two pages. A true-translated copy follows:

[first page]

S1 25/32

1

My last will:
Made on the day 19/5 1931
My property as of today
consists of

Claim against J. A. Bata of for all shares sold xx domestic and foreign comp.	Kc 50,000,000
My dwelling house in Zlin	100,000
Landed estates Loucka and Lazy and Schmergerle	3,000,000
Claim against the City of Zlin—About	4,300,000
	57,400,000

From this my property I bequeath

To my wife Mrs. Marie Bata	
Landed estates Loucka Lazy Schmergerle—	3,100,000
Further in cash—	Kc 5,000,000
To my son Tom Bata his legal quota	Kc 22,000,000

with the provision that this his property shall be administered by his mother until he reaches 22 years of age.
The proceeds shall be used for his education and the remainder shall be deposited for his benefit.

30,100,000

[second page]

Carried forward	30,100,000
To my sister Anna Schiebel I bequeath	1,500,000
To the City of Zlin the debt	4,300,000
with Bata a.s. J.A. Bata will pay	
The balance ~~x~~	Kc 21,500,000
	57,400,000

I give to my fellow workers
is to be paid
~~is payable~~ within 5 years with 5% interest
This amount ~~is to be paid in cash~~
to the Bata Workers Benevolent Fund and is to be administered in the spirit of the now effective by-laws.

It is understood that I have drawn up this last will with full understanding being of sound mind and without duress and in my own handwriting.

/s/ Tomas Bata

My previous testament hereby naturally loses its validity.

/s/ Tomas Bata

Published at the District Court in Zlin
on the 13th day of July 1932.

[Seal of
the District Court
in Zlin]

/s/ Loucka Bohumil

For convenience, I shall refer to the May 10 paper as the "sales agreement" and I shall refer to the May 19, 1931, paper as the "will". I shall refer to them collectively as the "May 1931 papers".

Plaintiffs suggest that the evidence does not show precisely when the May 1931 papers were written. This is to some extent true but in and of itself it is not of decisive importance. However, I think a reasonable inference from the evidence would be that they were written in the early part of 1931.

Plaintiffs also suggest that the May documents were merely drafts. They point out that shortly after the date of the May 19, 1931 will Thomas transferred his personal residence property and also later transferred other properties to Bata, a.s., although, in his will, he had left them to his wife. Also one company was listed which had been liquidated and others were omitted which were in existence. From these and other actions plaintiffs conclude that Thomas never intended to make the May 1931 papers effective.

Defendant does not dispute the foregoing facts but says they are immaterial. I do not agree that they are immaterial but do agree that they do not require a finding that the instruments were drafts.

The way the documents were prepared and the various other internal evidences of inaccuracy and correction of errors, etc., lead me to conclude that the documents were drafted by a layman. Indeed, I believe these documents were prepared by Thomas Bata without direct professional assistance and, as will be shown later, this was done deliberately in my opinion and with full awareness of the estate tax problem which would be created by his death if his shares were a part of it. See D-80, III, page 1, as well as certain oral testimony.

In view of the manner in which the papers were addressed and kept and because of certain other documents

in evidence, particularly D-80, III, p. 3, I conclude that the May papers were not intended to be drafts. I recognize that plaintiffs contend that Thomas made a will in December 1931 while on a trip to India. But the nature of the proof as to its existence and treatment does not alter my conclusion concerning the May 1931 will in view of D-80, III which speaks of Thomas giving directions with respect to the May will after his return from the trip to India.

This brings the court to a consideration of Jan's contention that by the May 1931 papers, when considered with the extrinsic evidence, Thomas intended to create a sales legacy in Jan's favor, which intention must be given effect under governing Czech law.

Under § 552 of the Czech Code a testamentary disposition is called a "last-will declaration". Admittedly a legacy must be made by a valid last will declaration. Czech Code § 647. The validity of a so-called "sales legacy" under Czech law is established.

Defendant's position is not always precise as to what document constitutes the last will declaration which contained the alleged sales legacy. He says variously that it may be found in the May 10 sales agreement alone, or in the May 19 last will alone, or in the two combined.

Can the May 10, 1931 sales agreement be considered a last will disposition to Jan? The langauge "I sell" and "you purchase" shows that the paper on its face does not contemplate a disposition to Jan at death. On the contrary, its language is the very antithesis of a sales legacy to Jan. Indeed, it is worded more like what we call a sales agreement than an agreement to sell. But conceding that the langauge of the May 10 paper is sufficient under Czech law to warrant consideration of extrinsic evidence to determine whether it was intended as a testament, I conclude that it cannot be so considered. I so conclude principally

because Thomas actually left a document which he himself explicitly designated as his last will and there is no suggestion that he was unaware of the distinction between a sales agreement and a will.

I need not consider whether the documents together constitute a testament containing a sales legacy because I am persuaded that Czech law requires the May 19 paper to be treated as Thomas' last will declaration. Moreover, under Czech law, in my opinion, the sales agreement paper may not by reference be considered a part of Thomas' last will declaration. I say this because I do not believe the last will expressly or tacitly refers to the sales agreement as required by § 582 of the Czech Code, if it is to be considered as part of a last will declaration. After all, there is not even a reference in the will to a date in connection with the claimed sale. Papers other than the testament may of course be used under Czech law for interpretation purposes when extrinsic evidence may be considered. But, as hereinafter shown, I do not believe this conclusion alters the legal necessity for finding some support for the claimed legacy within the language of the written testament itself.

I turn now to one of the basic issues of the case. It can best be presented by stating the contentions of the parties. Defendant's position is that under Czech law "The actual intent of the decedent is a fact of distinct operative significance. The only limitation is that, when it is discovered, a hint or clue to it must be recognizable in the declaration. It may not be completely unrelated to the document. Some support, however slight, must be discernable to the informed reader." As his brief reveals, by this contention defendant says extrinsic evidence may be used to discern the hint, clue or slight support in the document for the intent claimed. Plaintiffs, on the other hand, claim that under Czech law the hint, clue or slight support

for the disposition claimed must appear from a reading of the testament itself. If it does not, they say no extrinsic evidence can be used to "discover" it therein.

Preliminarily, I should note that the requirement is variously referred to as "hint", "clue" or "slight support" rule. They refer to the same requirement. I should note also that many of the authorities discussed by the parties relate to the question of whether or not a document or oral declaration constitutes a last-will declaration. See, e.g., PT-1406. We are not directly concerned with such authorities because there exists here a last-will declaration in writing—the May 19, 1931 document. As hereinafter determined, however, I believe the hint, clue or slight support requisite applies not only to the issue of the existence of a last will declaration but also to the issue of the existence of a particular disposition within an admitted last will declaration. (Compare D-1793, p. 2).

It is important to keep in mind that defendant claims that the May 19, 1931 last will contains a sales legacy in his favor. He apparently admits that the hint can only be found here by first considering extrinsic evidence. We thus see the importance of determining whether, a written testament being involved, the hint must be found in the testament alone, or whether it may be found, as defendant says, "after all available sources" are examined (law brief, p. 162). It should be noted that the "hint" test is but an aspect of the animus testandi requirement, i.e., that the intent to dispose upon death appear.

For convenience, I repeat the relevant words of the last will: The will states that "My property as of today [May 19, 1931] consists of claim against J. A. Bata for all shares sold • • •".

Defendant places great reliance upon the Austrian Supreme Court case of June 11, 1914 (Rv-1537/13—D-1788) to support his contention that the hint may be found by

resort to extrinsic evidence. In that case the testator left a testament which provided, inter alia, that "The statutory (intestate) right of succession of my wife, who is separated from me, remains untouched". I emphasize that a testament admittedly existed and the issue was whether or not a particular legacy was intended. The language of the testament, considered in conjunction with certain oral testimony, demonstrated to the court that the testator intended by the language to bequeath in his testament all that a wife was entitled to in accordance with the rules of intestate succession.

First of all, the opinion does not discuss the requirement that some hint of the testator's intention must appear in the testament. This is understandable since the hint requirement is clearly met by the quoted language of the provision of the testament which lends some support to the contention that it was intended to be in the widow's favor. Moreover, one of the admitted authorities in the field (Ehrenzweig, System of the Austrian General Civil Law, (1937 edition), Vol. II/2 pages 418-19, D-1791) demonstrates by his discussion of this case that it does not support defendant's contention. The following quotation is pertinent:

> "• • • Also oral utterances, e.g. to the draftsman of the testament, are to be considered[9]. Example: The testator had declared in his testament: 'The statutory right to heirship of my wife, who is separated from me, remains untouched'. Later on, the wife obtained a divorce and remarried. According to the testimony of the attorney who had drawn up the testament, the testator had spoken of this possibility, he wanted the statutory portion to be secured to his wife even for this contingency (in spite of Sec. 1266).[10] Such a remark, however, could not give a right of inheritance to his wife unless some provision in her favor had

been incorporated into the testament. For the interpretation must have 'some, however slight, support' in the testament and 'must not be outright contradictory to the unambiguously expressed intent.'[11]" (emphasis is Ehrenzweig's) [footnotes omitted]

Professor Ehrenzweig thus clearly assumes that the language of the testament in and of itself constituted some support for the conclusion that it was a provision in favor of the widow. The last two quoted sentences make it clear that extrinsic evidence of intention, no matter how strong, would not have been sufficient had there been no support for it in the language of the testament standing alone. It is vitally important to remember that Ehrenzweig recognized that some provision in favor of the claimant must appear in the testament.

Another recognized scholar, Schreier, in his work on "Interpretation of Laws and Legal Transactions (D-1865, pages 1-2) had this to say:

> "It appears from this rule that regarding last-will dispositions also no full theory of intent prevails in such a manner that no limits whatsoever are set to the free ascertainment of the intent, rather, the intent finds a limit in the language of the last-will disposition which we will define even more precisely. Thus an intent that is entirely outside of the language of the last-will disposition is not valid in any event as a last-will disposition, not even if it can be clearly proved. Thus, if the testator intended to leave a legacy to A, but forgot about it when he made his testament, A will not receive the legacy even when it is established that the testator declared before and after making the testament that A should receive a legacy and was of the opinion that he had left one to A."

Defendant argues that the example given by Schreier shows that he is referring to a situation totally different from that here involved. Certainly the example is extreme (where testator forgets to make a legacy) but it shows that even in the case of an admitted testament, where an intention to make a particular disposition is claimed, it is subject to the same, hint, clue or slight support test as in the case of an issue as to whether a document is a last will declaration. See D-1793, p. 2. It is not entirely clear whether defendant's expert witness testified at variance with defendant's present contention (cf. R. 7357).

I believe the Austrian Supreme Court case decided July 18, 1952, (SZ XXV 203—D-1784) is also significant on the point under discussion. In that case the testator left a written testament and a written supplement both of which clearly provided for a legacy in favor of his daughter, Edith. I emphasize that there was no doubt that a written testament existed. From this point I shall quote the court, (the underlined portion being most significant on our issue):

> "• • • The primary issue, therefore, is whether, on the basis of the testator's intent, the legacy shall be paid out of specific items of the estate.
>
> "The Court of Appeals holds that the intent of the deceased can be deduced only from the last will dispositions. The Supreme Court does not share that opinion. For the interpretation of a testament, oral remarks as well as writings not referred to in the testament, have to be taken into consideration. It is true that the interpretation of a testament must have some, however slight, support in the testament and must not be totally contradictory to the clearly expressed intent of the testator. The last will dispositions in the case before the court do by no means clearly indicate that the legacy shall be paid out of specific items of the estate, especially if the provi-

visions of Par 6 of the declaration of August 9, 1941, and the provisions of the testament of June 28, 1944, are literally interpreted."

There was of course a legacy to Edith and the issue was whether the testator intended that it be paid out of specific items of the estate. The court recognized that before a particular interpretation of a document can be adopted it must have some, however slight, support in the testament and must not be totally contrary to the clearly expressed intent of the testator. In obvious compliance with the quoted principles the court went on to consider the language of the documents and to conclude that they did not clearly indicate that the legacy was to be paid out of specific items of the estate. The important fact for our purposes is, however, that language susceptible of supporting Edith's contention appeared in the testament. Consequently, the court concluded that extrinsic evidence was properly considered in arriving at the proper interpretation of the documents.

I infer from the foregoing analysis that the requirement that a particular interpretation contended for must have some, however slight, support in the testament must be fulfilled solely from an examination of the testament itself. Thus, while the case is a defendant's exhibit, I am satisfied that so far as here pertinent it supports plaintiffs' basic approach.

Defendant cites the works of certain authors for the proposition that the hint or slight support need only be found in the light of the extrinsic evidence. An examination of these works does not support defendant's contention.

Defendant says that Dr. Escher, who wrote Vol. III (The Law of Inheritance) of the Commentary to the Swiss Civil Code supports his position. On the contrary, I be-

lieve the following quotation supports the view that extrinsic evidence can be employed for interpretation only if a hint for the interpretation claimed is found in the language of the testament:

> "• • • An intent of the testator, not contained or even hinted at in the disposition, may not be supplemented from other sources, perhaps oral or written utterances of the testator. But the use of such extraneous sources (outside the testament) is permissible where the wording, hinting in itself at an intent, leaves room for doubts concerning the intent of the testator, • • •" (D-1808A, p. 4).

Klang-Handl in his Commentary to the General Civil Code (first edition) Vol. II/1, p. 124, D-1792A is cited by defendant, particularly for the following sentence:

> "• • • Only what is covered by the form may be considered as contents of the last-will declaration, this, however, to the extent of the whole scope ascertained by interpretation. • • •"

[I adopt defendant's translation because I think the difference unimportant here].

I do not think Professor Klang, by the quoted language, intended to state that the hint or slight support requirement could be fulfilled by resort to extrinsic evidence. This is made rather clear from the following language which appears immediately before the quoted sentence relied upon by defendant:

> "On the basis that the subject-matter of interpretation can only be what the testator has not only intended, but has also expressed, at least by way of hinting at it so that it can be made fully understandable by resort to other means of exploration, the

question as to what extent consideration of the requirements of form may present an obstacle to interpretation, does not raise any difficulty. Declarations which do not meet the requirements of form are invalid (Sec. 601)."

By the foregoing language I believe the author gives full recognition to the Czech law that the hint requirement must be met in the declaration, apart from the extrinsic evidence.

But defendant insists that "It is not a matter of clarity or lack of clarity of the language on its face that determines whether the intent shall be explored aliunde; it is 'the conflicting positions of the parties'; 'the doubts usually introduced by the interested parties', which requires that the intent be explored and ascertained".

It will be noted that in support of his contention defendant quotes the words, "the conflicting positions of the parties". This language appears in the opinion of the Czech Supreme Court of June 19, 1935, Rv. 1119/34 (D-1781, page 3). In that case there was a last will disposition wherein the testator directed that a certain house should pass to the defendant. However, he was obligated to pay his brother and sister each one-third of the net worth of the house after deduction of the liabilities outstanding on the house. There was a written declaration and the doubts which were introduced related to possible meanings of a particular disposition, viz., whether a certain mortgage was to be considered as a liability in computing the net worth of the real estate.

After stating the issue the Supreme Court said:

"The decision depends on the construction of the last disposition of Ernest H. of March 7, 1929. In view of the conflicting positions of the parties one cannot limit oneself to the wording of the pertinent provision of the testament and it is necessary to ascertain the

real intent of the testator and the intention which he had when said disputed provision was drafted, because testamentary succession is based on the intent of the testator which shall be ascertained also on the basis of circumstances which are beyond the contents of the testament."

Obviously the case dealt with a situation where interpretation was permissible, because there was admittedly a last will declaration containing an admitted disposition to a particular individual and the doubt was as to the scope of the disposition. It is not authority for the position that the hint of a disposition in the testament can be discovered by the use of extrinsic evidence.

The second quotation relied upon by defendant is the language: "the doubt is usually introduced by the interested parties". This quotation is from the scholarly work by Klang-Handl (D-1792, page 3). First of all, because of the limited scope of this quotation, it does not give the full picture of what was intended by the author. The full sentence reads as follows: "'This overlooks that the declaration need not be unclear by itself but that the doubt is usually introduced by the interested parties". The quoted "This" is a reference to a decision of an intermediate court, later reversed, which announced a rule limiting interpretation to cases where only the language of the disposition is "obscure and un-understandable". The author's criticism, which was apparently later upheld, dealt with a situation where there was some basis in the declaration for the interpretation claimed. This is made evident by the fact that in a preceding portion of the very same paragraph, the author states that "supplementing interpretation may take place, only then, 'when the declaration itself offers some basis for supplementing the declaration' ". The author then cites Schreier as supporting this proposition. And, Schreier, in my opinion, sup-

ports the principle that the hint must be found in the document apart from the extrinsic evidence.

Defendant also places great reliance on Pfaff-Hofman's Commentary to the Austrian General Civil Code (Vienna 1877) Vol. II/1, pp. 453, D-1872). Neither the excerpt quoted by defendant nor the footnotes state anything contrary to my interpretation of the requirement under discussion. The text states that a legatum debiti (intent to create a legacy of a debt) may be found from language reciting the existence of a debt owed the claiming party plus the surrounding circumstances. The animus legandi will be assumed, where the contrary is not evident, since testaments and codicils have the purpose to dispose of property. The situation covered by Pfaff-Hofman does not touch our issue because it deals with a situation where a testament contains a provision possibly favoring the party who was making the legacy claim. The hint, clue or slight support requirement is assumed to exist in the situation presented. It is the issue here.

In arguing that the animus testandi may be found by resort to all kinds of extrinsic evidence despite the language of the instrument, defendant lays great stress upon the following quotation from Klang-Handl (D-1798):

> "The wording is not always decisive; even where it seems to rule out animus testandi, it may be assumed, considering all the circumstances[5]."

Footnote 5 is as follows:

> "[5]. Decisions 5/30/1860, Gl.U. 1143: 'What for a testament? Everything belongs to you anyhow.' 9/13/1891 Gl.U. 13887: Designation of a complete testament as a draft."

The Klang-Handl discussion is primarily concerned, as the footnote indicates, with the issue as to whether cer-

tain oral or written words in the circumstances constituted a last will declaration. On the basis of the footnote cases it may be inferred that the author was dealing with a situation where there was a provision in favor of the claiming party and the only issue was whether it was made animo testandi. I find nothing to indicate that the language was intended to express a view contrary to my above announced conclusion with respect to the hint requirement of Czech law.

Defendant cites numerous other cases for the proposition that the hint or slight support need only be found in conjunction with the extrinsic evidence. In every one of the cases cited there was testamentary language itself giving some support to the contention of the claiming party. Let us consider them.

Austrian Supreme Court decision (May 30, 1860, D-1800). Oral will found from the following words:

> "What do we need a testament for? There is no need for it. Everything as it is belongs to you [wife] anyway. Nobody can take anything away from you."

The words "Everything as it is belongs to you anyway" certainly is some support for the contention that the testator intended his wife as his testamentary heir.

Decision of the Austrian Supreme Court (June 25, 1924, D-1801). Oral declaration by husband, "Everything belongs to my wife". Here again the language, as the court must have recognized, is certainly slight support for the widow's claim of testamentary heirship.

Decision of the Austrian Supreme Court (September 27, 1882, D-1802). Provision in written testament that, "* * * A savings book with 200 fl. and another one with 94 fl., have been issued in my name, but they belong to the church A; as do 200 fl., which I lent to a priest, * * *". The church claimed, inter alia, a legatum debiti of the 200

fl. "lent to a priest". Passing over other distinguishing features, it is once again apparent that the language of the testament gave some support to the church's claim.

There are numerous other decisions relied upon by defendant, D-1792B, D-1809, D-1807, D-1809B, D-1872-f. 104, D-1873; see also D-1808, D-1806, D-1804. Leaving aside other possible distinctions, the fact is that in every case there was some provision in favor of the claiming party which at least supplied a hint to support his claimed interpretation.

I also note that defendant claims the testator "disguised" the legacy to him by employing language of past sale. The disguise was motivated he argues by a desire to avoid taxes and to escape disclosures concerning foreign holdings. I recognize that there can be a disguised legacy under Czech law but I note that in all the disguised legacy cases there was some provision possibly favoring the claiming party. The disguise related solely to the form of the transaction. See e.g., D-1873, D-1872, n. 104, D-1808. By way of contrast, in this case there is no provision at all in the will in defendant's favor. The will, inter alia, makes specific dispositions of the proceeds of an identified claim and Jan is merely identified as the person against whom the claim exists.

Defendant also stresses the applicability of the doctrine of favor testamenti. At times this concept appears to be nothing more than another term to describe the process employed to assist in ascertaining the testator's real intent. At other times it is applied to the situation where the court is doubtful as to whether or not a disposition was intended. In such a case the principle favors an interpretation which makes an effective disposition.

Neither aspect of the principle alters the requirement that the testament itself must contain some support for the position of the claiming party. This is made clear by the underlined words in the following quotation from the

Klang-Weiss, Commentary to the General Civil Code, Vol. III, (2nd edition), pp. 218-229, D-1793:

> "There is a very urgent need for an interpretation of declarations mortis causa which endeavors to find the actual intent of the decedent: Not where there are two possible interpretations at issue, one of which answers in a higher and the other in a lesser degree the decedent's design; but where there is the only choice between, on the one hand, a construction (upholding the will) which finds some support in the wording, and on the other, a construction declaring the last-will declaration ineffective."

I conclude that under Czech law the hint, clue or slight support for the claimed disposition (here a "sales legacy") must be found in the language of the testament.

As I read defendant's brief, it is conceded that the hint, clue or slight support cannot be found from the language of the May 19, 1931 will alone. If my understanding of defendant's position in incorrect, and defendant contends that the hint appears from the language of the will alone, then I say that in my opinion the last will document itself does not contain a hint, clue or slight support for the claimed intent to create a sales legacy in Jan's favor. My conclusion is based upon the admitted fact that on its face the will contains no provision in Jan's favor. The will itself clearly gives to identified persons and entities the proceeds of a claim arising from a past sale to Jan (6807-08). Jan is merely identified as the person against whom the claim exists. There is no hint of a bequest to Jan.

As I find the Czech law and without regard to the testator's actual intention, it must be concluded that Thomas Bata did not by his May 19, 1931 last will create a sales legacy in favor of Jan. Other important conten-

tions concerning this aspect of the case therefore need not be considered.

Constitutive Recognition

Defendant next contends that even though the sales legacy issue based upon last will interpretation is determined against him (as it is) he is, nevertheless, entitled to the shares because the heirs entered into a contract with Jan by which they recognized him as the legatee of a sales legacy (7437). This contention is based upon the Czech doctrine of constitutive recognition. This doctrine, which admittedly has no Code definition, may be generally stated as follows: "Recognition is a contract whereby without mutual concession by the parties a given legal relationship is determined. The agreement on recognition, therefore, is not a mere admission of a fact, but is in the nature of a disposition concerning a legal relationship in the same way as a compromise". (Czech Supreme Court, D-1813). This recognition is an independent source of obligation (D-1819).

The Austrian Supreme Court has said, and defendant agrees, that it is a question of fact whether the party sought to be held "intended to commit himself anew * * *" (D-1820). I emphasize the necessity for finding an "intent to commit anew" and the fact that constitutive recognition "is based on the principle of freedom of contract * * *" (D-1822).

Defendant seems to recognize that under the doctrine of constitutive recognition he has the burden of showing that plaintiffs were parties to a new obligation with Jan which was created after Thomas' death. Defendant concedes that Tom and his mother did not expressly enter into any such new obligation. But he contends that Tom and his mother did so tacitly as evidenced by their subsequent conduct in accepting and carrying out the wishes

of the decedent as expressed in his two May 1931 documents.

The Czech law permits the recognition to be tacit but, in such a case, as the Austrian Supreme Court said, "* * * a tacit declaration of intent can be assumed only if the facts, with consideration of all circumstances, do not leave any ground for a reasonable doubt as to the intent of the party". (Decision of October 21, 1891, D-1829).

The principal factual contentions urged by defendant can be summarized as follows:

(1) Tom and his mother were aware of the existence of the sales agreement shortly after Thomas' death.

(2) Tom and his mother allowed Jan to take into his hands the control of the Bata concern.

(3) They executed all documents required of the statutory heirs to complete the transfer of record title of certain shares to defendant.

(4) They accepted the book credits as fulfillment of the legacies provided for them.

(5) They understood the will to express Thomas' wish as to what should happen.

(6) They carried out the disposition in the disguised manner which he had provided.

(7) They executed a formal statement in the estate proceeding designed to effectuate Thomas' disguised disposition. Defendant emphasizes that the Dutch court found that these actions of plaintiffs in the court proceedings had "dispositive significance" regardless of whether the will gave Jan a valid title for the obtainment of ownership.

(8) For the next approximately 12 or more years plaintiffs "went along" with Thomas' intention.

I believe the following discussion considers each of the "factual" allegations relied upon by defendant.

There can be no doubt that after Thomas' death, Tom and his mother did everything required to put Jan in a position from which it appeared that he had taken over the Bata shares pursuant to an inter vivos sale from Thomas. This is evident from the numerous documents executed by them transferring legal title to various Bata shares to Jan.

While the matter is disputed, I shall assume, as defendant contends, that shortly after Thomas' death, Tom and his mother were aware of the paper which we have called a sales agreement. I note, however, that it is not clear that the heirs were made aware of the facts surrounding Jan's signing the sales agreement paper or that there was any suggestion to them that it might be legally infirm.

Under Czech procedure Tom could be declared of full age when he became 18 years old. This procedure was followed on September 21, 1932. Although there is a dispute as to the reason for deciding to adopt this procedure, I believe it was done primarily to avoid minute inquiry into Thomas' estate which would have otherwise been required by the Czech court for the protection of a minor. Thus the purpose once again was to assist in perpetuating the fiction of an inter vivos sale.

Defendant emphasizes particularly the declaration filed by Tom and his mother in the estate proceedings. He contends that by recognizing an inter vivos sale at a time when they knew that the documents were left by Thomas so that they could only be found at his death, Tom and his mother recognized that Thomas had created a sales legacy, citing an Austrian decision (D-1760A, n. 11).

The language of the declaration found in the transcript of the estate proceedings recites in part that "Because Jan A. Bata has settled this amount (57,262,131) with the firm Bata, a.s. in Zlin to the benefit of the testator Thomas Bata, this property of Thomas Bata appears, as of the date of his death, as a claim against the firm". It also said, "The following shall obtain: from the claim of the test[ator], Thomas Bata, against the firm Bata, a.s. in Zlin," then Tom and his mother, inter alia, are listed to receive certain amounts (D-90).

The foregoing language on its face helped to implement the fiction of an inter vivos sale. While it is contended that Tom and his mother were not present at the proceeding, I conclude that they must be held to have had knowledge thereof. Although Tom and his mother must therefore have been aware of the fiction, I do not believe that by the quoted language they agreed to recognize a sales legacy in favor of Jan. After all, the sales legacy theory was apparently not even "discovered" until many years later and after litigation commenced. This is important because we are talking about a contract when we speak of constitutive recognition.

Other facts cast great doubt upon the right to find tacit recognition here. Jan was unaware of much of the important evidence now relied upon to show tacit recognition. He testified that he was not aware of the statement signed by the heirs in the estate proceedings. This is important because a declaration made by plaintiffs to a third person would not impose upon them any obligation toward defendant (D-1829). It should be added that recognition alone will not result in the acquisition of ownership (p. 1425).

But even more important, Jan himself has in his testimony in the various actions here consistently stated that there was an inter vivos sale. His claim to the tax authorities was based on the same inter vivos transaction. These

facts are necessarily inconsistent with an intention on his part to accept the subsequent actions of the heirs as recognition of a new agreement.

Finally, I find no basis to indicate that Jan on the one hand and Tom and his mother on the other were conscious that there was any incomplete or doubtful situation to be resolved after Thomas' death. Thus, even under defendant's formulation of this requirement, the necessary factual basis is absent.

Defendant stresses that Thomas' widow testified in the New York trial that she understood the will, "* * * to express the wish of Thomas Bata * * * As he pictures or imagines the last will—his idea of what should happen." (p. 4014 of New York transcript.) This was consonant with an understanding that the arrangement had been created by Thomas but certainly it does not show any intent to make a new agreement with Jan.

Defendant also emphasizes the following facts: by the terms of the will Tom had received a legacy of $660,000 and the widow had received the city and country estates plus about $150,000; they never heard of a sale by Thomas in his lifetime and they knew he had not relinquished any aspect of his authority before his death; they "must have been aware" that the business was worth materially more than 50 million crowns; Jan had not paid any part of the price—indeed, he could not have paid it personally. To summarize, they knew that there had been neither delivery nor payment of the unusual "purchase" price. (Defendant's fact brief, p. 226.)

The foregoing facts, particularly when considered in conjunction with those discussed above, do not point to an intent on the part of the heirs to agree anew with Jan to "carry out" a sales legacy in Jan's favor. Rather, they are equally consistent with the intent on the part of the widow and young son to "go along" with the fiction of a sale. One can hardly imagine any question being raised

which would tend to throw doubt upon the scheme when one considers the consequences of such action—consequences which must have been clear to all the management of enterprise, including Jan.

While the heirs did not attack the fiction for a good many years I do not believe such lapse of time evidences tacit acceptance in view of the evidence concerning the original transaction and the other facts discussed. I emphasize again that we are here concerned only with the existence of a new agreement between defendant and the heirs.

I conclude that the doctrine of constitutive recognition is not available to defendant under the facts of this case because I find that Tom and his mother did not enter into any recognition contract with Jan. In any event, the same result follows under Czech law since I am satisfied that the evidence at least leaves room for reasonable doubt that either Tom and his mother or Jan ever intended to enter into such a contract.

Tacit Waiver or Disclaimer

Defendant next argues that under the doctrine of tacit waiver or disclaimer the plaintiffs are precluded from asserting their title to the property here involved. Since plaintiffs are, in view of previous rulings, claiming the property in dispute as the owners thereof, it would seem reasonable to impose upon the defendant the burden of establishing that the Czech principles of tacit waiver (which involve the good faith concept) preclude plaintiffs from claiming ownership. I should emphasize that the property consists not only of the Leader shares but also of shares of the Delaware corporations which were created years after Thomas' death.

Since defendant uses tacit waiver and disclaimer interchangeably I shall hereafter only use the expression "tacit waiver".

I believe defendant's argument can best be understood by quoting the material on the subject appearing in the Klang-Gschnitzer Commentary To The General Civil Code (PT-1415):

> "Continuing failure to exercise a right means waiver of the right where, considering the circumstances of the particular case, the other party was justified in relying on the assumption that the transaction had been finally wound up. Where the delay took place in order to speculate at the risk of the other party or where the belated assertion becomes improper due to changed conditions, the concept of acting contrary to good faith is referred to in addition to the concept of tacit waiver."

Plaintiffs assert several reasons why the doctrine is inapplicable to the present case. Plaintiff's principal contentions and defendant's answers may be summarized as follows:

1. Rights in property cannot be lost through any concept of tacit waiver because it has no application to in rem rights. Defendant denies that the doctrine of tacit waiver is so restricted.

2. Tacit waiver is solely a matter of defense which is only available to a person in possession. It does not confer ownership. Defendant first appears to agree that he must show "possession" to assert the tacit waiver defense. He contends that he should be here considered as though he has possession and is defending it against plaintiffs' claim. His reasoning is that the "Bata concern" was transferred to him and in such a case physical delivery of each item of the concern is unnecessary where the custodian (presumably referring to the party having physical possession of the Leader bearer certificates) accepts the authority of the transferee. He appears to suggest, alternatively, that in an

action where a custodian has deposited property in court, which was not in the possession or control of either claimant, the possession and control requirement is not a prerequisite to the application of the tacit waiver doctrine.

In order that the discussion may be kept in focus I think it desirable to restate some of the matters which must be treated as established for purposes of the decision on the issue of tacit waiver. There was no inter vivos sale by Thomas to Jan. By accepting, unconditionally, the deed of delivery of the entire estate, the heirs (Tom and his mother) became vested under Czech law with the ownership, inter alia, of Thomas' shares (including Leader), subject to the duty to pay debts and legacies. Since Jan received no sales legacy either by will or under the doctrine of constitutive recognition, Tom and his mother, as intestate heirs, continued to hold the Leader shares, inter alia, as absolute owners.

The question now is whether under the doctrine of tacit waiver the heirs are precluded from asserting their ownership to the Leader and other shares here involved because of their conduct after Thomas' death.

In resolving the tacit waiver issue, I shall assume, as defendant contends and plaintiffs deny, that the defense is applicable to an ownership (in rem) action. This brings the court to the second major contention of the plaintiffs, viz., that the defense of tacit waiver is not here available to the defendant because he was not and is not in possession or control of the property involved.

Defendant at least tacitly concedes that in the ordinary action by an owner against the possessor of property, tacit waiver is a matter of defense and the person asserting it must show that he has absolute control or possession of the property involved (7436). Defendant contends that by virtue of taking over the "Bata concern" he at one time had what amounts to constructive possession of the Leader shares. He apparently argues that this "posses-

sion" exists today at least for the purpose of fulfilling that requirement of tacit waiver. He so argues although the property in question was not subject to his absolute control or physical possession when this action was commenced. He asserts that Muska (the trusted "lieutenant" who died before the dispute broke out) kept the Leader shares for him as he had for Thomas. In fact, defendant contends that during one period, through a joint safe deposit box with Muska in a London bank, he had free access to all the Leader shares.

I am unable to find that defendant ever had what amounted to physical possession of the Leader shares here involved. My conclusion is based largely on Jan's unfamiliarity with the "whereabouts" of these important certificates over the years and indeed his relative "indifference" with respect thereto.

Does Jan have constructive possession? In answering this question I shall assume (apparently contrary to plaintiffs' contentions) that constructive possession could be obtained under some circumstances by "taking over" an enterprise. There can be no doubt that the Swiss mandatories considered Jan as the "chief" of the enterprise after Thomas' death. But the mandatories were not concerned about title as between the Batas so long as there was no dispute as to the identity of the person entitled to give orders to them. Indeed, undue curiosity could be embarrassing and the Swiss mandatories were certainly "sophisticated" in the ways of European financial matters. The control of the Leader shares remained after Thomas' death primarily the concern of Muska, one of the other important lieutenants in the enterprise. Since Jan "took over" the business in furtherance of the fiction, indifferent (in my opinion), to legal rights, I cannot find that Jan ever had "possession" of the Leader shares in the sense required by the tacit waiver doctrine.

As I read defendant's law brief (p. 298-9) he contends, apparently alternatively, that where the custodian of property has deposited it in court for purposes of having the rights of the parties therein determined, and "* * * where the two claimants face each other in a court having jurisdiction to determine in personam issues between them, the issue of tacit waiver may be availed of and adjudicated". To emphasize this point he asserts (contrary to plaintiffs' contention):

> "There is no requirement that the party who is entitled to raise this issue must himself be in possession of the disputed property." (Law brief, p. 299)

Defendant's expert testified that "the remedy of tacit waiver does not create ownership, but only defeats a special ownership claim under certain conditions * * *". Thus, under Czech law an owner does not lose his ownership where a tacit waiver is recognized but merely loses his right to assert such ownership (7423); see decision of Austrian Supreme Court, November 28, 1952; compare PT-1417. This refinement has practical importance because plaintiffs are, in view of my prior rulings, admittedly the owners of the property in dispute and defendant seeks to prevent them from obtaining possession under the doctrine of tacit waiver. May the doctrine be employed where, as here, the defendant had neither possession nor exclusive control of the property at the time the custodians deposited the property with the court? I am unable to accept the testimony of the defendant's expert that in such a situation under Czech law the question of the defendant's possession is, in effect, irrelevant. The expert cited no authority for the precise point involved and gave no reason why the ordinary possession or control requirement of tacit waiver should be inapplicable where as here there are two claimants to the property, but one is admittedly the owner.

In this action, plaintiffs and defendant both assert ownership of the property. Defendant is not defending a

claim by plaintiffs for the delivery of property in his (defendant's) possession. Obviously then, he is not using tacit waiver as a defense. Yet tacit waiver can only be used to defend exclusive possession or control under the Czech law as I find it. Indeed, in his earlier testimony the defendant's expert discussed the doctrine in terms of "defense". However, later in the trial, when the "difficulties" involved in applying the doctrine defensively became apparent, he apparently took the position that his earlier discussion was not intended to refer to a situation such as is now before the court, namely, where a custodian places property in court and where such custodian at the time is not subject to the exclusive control of the person relying upon tacit waiver. None of the cases relied upon to support the doctrine shows its use as an affirmative remedy. To deliver possession to a claimant who did not have possession or exclusive control would constitute affirmative action smacking of ownership vindication. It would thus be inconsistent with the law, as stated by defendant's expert, that tacit waiver cannot create ownership in the person relying upon the doctrine (7420-21).

I therefore conclude that under the facts of this case the defendant, not having been and not now being in possession or exclusive control of the property here involved, cannot defeat a recognition of the plaintiffs' ownership rights in this action under the defense of tacit waiver.

While this ruling disposes of the tacit waiver defense, I believe that even if the defense is considered on the facts it is without merit because the facts leave the matter in such doubt that it should be resolved against defendant. Admittedly, neither Tom nor his mother executed any instrument transferring title to the Leader bearer shares to Jan. Consequently, Jan must rely upon the facts to render the principle operative. Let us consider some of them.

There can be no doubt but that Tom and his mother, after Thomas' death, cooperated fully to implement the

fiction that Thomas had sold the shares to Jan during his lifetime. And there can be do doubt that Jan was the "chief" of the enterprise from 1932 until the early 1940's when he was forced to go to Brazil because his name appeared on the British and American Black lists. Nor is it disputed that during those years he managed the growing enterprise with great effectiveness. But the basic problem remains as to whether Jan was, under the circumstances, justified "in relying on the assumption that the transaction [involving ownership succession to the Bata enterprise] had been finally wound up".

The assumption which can be ascribed to Jan can only be found from an analysis of the evidence. Of course, Jan testified that he had an oral inter vivos arrangement with Thomas but this has been rejected in at least one other court. Under all the circumstances I am unable to conclude that he acted on the assumption that the transaction was finally wound up on the basis that he believed he was the purchaser pursuant to an inter vivos purchase.

I conclude that Jan was aware that the arrangement created by Thomas was intended primarily to create the fiction of an inter vivos sale principally to avoid the payment of heavy estate taxes on the fair value of the business. I further infer that Jan was aware that the assets were far more valuable than shown and that in consequence, he was aware that amounts allocated to the widow and son were far less than the equivalent portions of the fair value of the assets. Thus to say that Jan was justified in believing that the transaction was finally wound up we would have to find that he believed Thomas "sold" him the business for about 20 to 25 per cent of its fair value. Obviously this required him to believe that Thomas was making a gift for the most part although he was at the time "grooming" his son to succeed him.

I believe that Thomas also adopted the fiction to avoid the disclosure of some of his foreign operations which

might have caused serious embarrassment to the Bata name and business in Czechoslovakia. It will be noted that the very valuable Leader holdings were not identified in either May 31 paper. Jan must have had some inkling of this "second" purpose of Thomas in adopting the fiction, though how precise it was, I need not con-ider here.

It will be noted that the only "payment" by Jan was a debit entry on the books of Bata, a.s. This was an arrangement which was accepted by all including Jan since literal compliance with the terms of the so-called sale in this respect would have been impossibly burdensome. Defendant says these entries constituted "payment" of the sales legacy while plaintiffs say there was no payment (and the New York court agreed). Once again I believe the "payment" was handled in this way merely to implement the fiction of a sale.

Other factors are important as showing that in Jan's mind, as well as in the minds of the other leaders of the enterprise, it was important to carry out the fiction without regard to "legal rights" as between Jan and the heirs. Some have been previously mentioned in the opinion. Although it was made to appear on the Bata, a.s. books that the inheritance tax payments on the assumed inheritance were charged to the heirs' accounts, the fact is that an equivalent credit was granted them on the Leader books. Certain of the real property involved was not, insofar as legal title was concerned, in a position where Thomas could will it to the widow (because they were titled in name of Bata, a.s.). Yet the properties were conveyed to her with Jan's approval. These factors as well as others too numerous to mention show that effectuation of the fiction of an inter vivos sale was the important thing and the determination of the rights of the parties inter sese a matter of relative indifference. Of course defendant explains these actions on the basis of his desire to carry out Thomas' intention as expressed in his will without regard

to legal niceties but the evidence in its broad sweep compels me to base it on the fact that everyone cooperated to carry out Thomas' scheme although it had many "bugs" which required improvization.

I therefore conclude that Jan recognized Thomas' true purpose in leaving the documents and took over as chief in furtherance of the fiction. Obviously, as Thomas must have been aware, the fiction would not have had any chance of acceptance had it purported to reflect a sale to the widow or to the minor son of Thomas. One naturally asks why Jan was selected. A substantial answer is found in the fact that he was the only eligible Bata in the higher echelon of the business. Moreover, Jan was very close to young Tom, in fact, he was his Godfather. Also, Jan had substantial experience in the business. A "sale" to him had a veneer of actuality.

It is interesting to note that in his 1918 will, Thomas left his then five year old son and his widow substantial interests in the enterprise (D-68). This will became a matter of public knowledge at his death. The May 1931 will revoked his "previous testament" which I infer was his 1918 will. I think it is reasonable to infer that Jan was aware of the scheme of the 1918 will after Thomas' death. At the time he drew his 1918 will Thomas was seriously ill. Because of its importance I quote at some length from that will:

> "With the income of my son, up to K. 50,000 my wife may dispose of, above that the decisions shall lie with his Guardian. The entire management of the firm (struck out: 'until my son becomes of age', and substituted herefor:) for five years I entrust to Mr. J. Blazek. For that purpose I transfer the voting right from my son to the said Mgr. Blazek, that is, to the extent of 45%, with the balance of my son's votes being transferred to Dr. Hodac. The voting rights under the shares of my wife, until my son be-

comes of age, I transfer to Dr. Janos. After five years 25% of my son's voting rights shall pass from Manager Blazek to J. Bata (my brother), with the rest of voting rights remaining unchanged.

"After my son has become of age, his personal voting rights reverse to him.

"Of the present personnel, until my son's becoming of age, the following may not be given notice of dismissal:

"Jan Bata
Leopold Bata
Bozena Klaus (ova)
Maria Bartus (ova)"

It is significant not only that he separated ownership from control but that he was concerned with administration during Tom's minority. When Tom came of age even Jan was to be subject to his control. Of course the business and conditions changed greatly between 1918 and 1931 but Thomas' attitude toward his son and wife did not.

Certain writings (e.g., "moral testament") and speeches of Thomas are stressed by defendant as tending to show that Thomas intended to treat the business as though his son was not entitled to any priority as his successor. Defendant repeats the words from a 1927 article by Thomas in which he spoke of his thousands of sons and said, "I shall leave my fiddle to the best of them all" (D-4, pp. 300-302). Jan says this shows that Thomas was primarily concerned with the success of the business. The court must note, however, that at this very time he had a will giving beneficial ownership of most of the enterprise to his son and wife (D-68, D). Thus his words, assuming they were known to Jan, cannot be given the full importance which defendant now ascribes to them. Incidentally, the article also shows that Thomas expected to be living

when his son was grown. Thus, Thomas' words must be read in the light of his actions in grooming Tom to take over and in conjunction with the other matters mentioned. Thomas' 1918 will indicated that paternity spoke louder than words.

It is also evident that Jan recognized that Thomas was grooming his son to take over the enterprise and in fact Jan himself testified that he continued to follow that procedure with respect to young Tom after he took charge. Not until years later did his attitude change. It is also significant that others in the enterprise continued to take action designed to perpetuate the fiction of an inter vivos sale although they must have known that there was no such sale. The defendant must have been aware of some of these actions and their purpose.

It is true that Jan was made the record owner of certain shares by virtue of documents signed by the heirs and it is also true that the books of Bata, a.s. showed Tom and his mother as being owed the amounts of the legacies mentioned in Thomas' last will. This and other evidence is relied upon by defendant but it is all consistent with an intention to carry out the fiction created by Thomas. Certainly, at the time they were doing these things both parties were aware that Thomas had not sold Jan the business during his lifetime and Jan at least was aware that the enterprise was worth much more than the "sale" price fixed by Thomas.

It is noteworthy that after Thomas' death Jan approved the continuation of the practice by which Bata, a.s. absorbed many of the widow's bills. It may also be noted that in the thirties Jan himself substantially duplicated in Tom's favor the two-document transaction of Thomas, although making provision for his own family. Obviously this was to be another "fiction" and is some evidence to show how he understood Thomas' papers. It loses its importance as showing an act of ownership by Jan when

it is considered against the background of what I find was Jan's then understanding of Thomas' action and the further fact that at that time Tom was only in his early twenties and had not yet fully justified himself in Jan's mind.

In a sense this case can only be understood by realizing the stature of Thomas Bata and his business in the small country of Czechoslovakia. He was the absolute owner of the largest business in the country and employed thousands of people. At the time of his death, he was admittedly a strong leader whose "word was law" to his family and his associates. The evidence shows clearly that he was actively concerned about the problem of heavy estate taxes shortly before the dates the 1931 papers bear and that he did not look kindly upon payment of heavy taxes. Indeed, the inference is warranted that he realized that if all of his business assets were included in his estate for tax purposes it would imperil his business in a very real sense. The rate for a wife and child was 26%. This is to be contrasted with the 2% tax on written sales agreements. These factors plus the inaccuracies in the will and the physical facts surrounding the documents lead me to conclude that Thomas alone concocted and created the scheme which is evidenced by the May 1931 documents. In contrast, his 1918 will was prepared with the assistance of a notary and reflects a "direct" approach to inheritance which was not influenced by the subsequent substantial increase in the value of his holdings.

If one is surprised that the Czech tax authorities did not look through the fiction the reason is not too hard to find. Certainly, they had no desire to kill the goose that laid the golden egg, which Bata was to Czechoslovakia. Moreover, Thomas had been a leading citizen of the Republic. Thomas had arranged matters in such a way that the taxing authorities had an excuse for "going along" with the fiction of an inter vivos sale.

In the setting I have described it would have been unthinkable that young Toni and his mother would have "rocked the boat" by raising some question about the validity of the known fiction. It is in this sense that I understand the widow's testimony that she, in effect, was going along with Thomas' wishes. It must also be remembered that young Tom was in the business but certainly was not sufficiently mature to be the chief. So far as appears, neither Tom nor his mother sought or had independent legal counsel during this period although they did have a relative who was so trained and presumably available.

I am convinced from the evidence that Jan was aware that he was designated by Thomas in furtherance of the fiction and that he did not in the earlier years consider himself the absolute owner of the so-called Bata enterprise. It is true that in the later years of his control he took action which is some evidence of ownership ("firing" of Tom in 1939) but in view of the time when it occurred and in the light of the then existing situation, it is not sufficiently strong to sustain defendant's burden.

One may ask why Tom and his mother did not assert any claim of ownership until the forties. Parenthetically, it is argued by plaintiffs that they first raised some such point in 1939 but I find the evidence so doubtful on this point that I am willing to assume that the real ownership dispute broke out in the forties. However, I have no doubt that the "makings" of the dispute were evident before that time.

As to the period between 1932 and the beginning of World War II, I think it is clear that, apart from Tom's immaturity and his mother's status, they could not have thrown doubt upon the fiction without subjecting Thomas' stature and the business to serious consequences. Moreover, Jan's actions were not necessarily inconsistent with the view that he was merely effectuating the fiction created

by Thomas and was training Tom for succession. Certainly there is room to find an element of trust existing between the parties which "flavored" the situation.

When World War II broke out in 1939 Tom was only 25 years of age. Thereafter the war caused great confusion and prevented access to Czechoslovakia to an ever increasing extent. Thus, accepting as fact that plaintiffs did not clearly assert any ownership rights before the middle forties, I am inclined to conclude that the problems of the war period were such that the activities of the parties during that time are not decisive in resolving the issue now under discussion. Thus, even Jan's statement to the authorities in which he, in effect, denied knowing who owned the Leader shares cannot be considered decisive under the circumstances. Indeed, much of the evidence of happenings during the war years confuses rather than assists in resolving the basic issue. It represents actions taken for a purpose (to avoid seizure as enemy property) which is not necessarily related to the dispute here.

I therefore conclude on the facts that Jan has not sustained his burden of convincing the court that, considering the circumstances of this case, he was justified in relying on the assumption that the transaction had been finally wound up. (Compare D-1843, p. 3). Nor do I believe it can be said that by asserting their ownership plaintiffs are acting contrary to good faith. Thus, plaintiffs are not precluded from asserting their ownership claim because of any tacit waiver. Other contentions of plaintiffs under this issue need not be considered.

Motions to Strike

The parties, particularly plaintiffs, have filed elaborate motions to strike exhibits. Defendant's motions will be denied. Plaintiffs' motion to strike all defendant's exhibits because they are irrelevant in view of the New York

judgment will be denied. Plaintiffs' motion to strike exhibits relating to German and Swiss law are denied for the reason that I think the matter goes to weight rather than to admissibility.

Any reasonable allocation of judicial time to this case militates against an explicit treatment of plaintiffs' other three motions. My treatment and conclusions on the various issues posed must be the answer to these motions which basically "go along" with the merits of plaintiffs' contentions. Therefore, in the exercise of discretion, I decline to rule on the motions except as my rulings may be implicit in the conclusions reached herein. This is done solely in the interest of the prompt administration of justice. I cannot find that this approach will prejudice either side.

Conclusion

This case was ably and thoroughly presented. The case was vastly complicated by the fact that the varying positions and testimony of the parties are relied upon endlessly to affect credibility, etc. I have passed over most of such material in the interest of a "direct" determination. The court does not pretend that the case was "easy" to decide. The court has attempted to articulate its basic conclusions. Of necessity I have not explicitly recognized all of the legal or factual contentions relied upon by the parties, but those not mentioned are not deemed to be inconsistent with the conclusions announced herein.

I conclude that plaintiffs are the beneficial owners of the 1170 Leader shares, all of the North River shares as well as 2,200 shares of Westhold Corporation; certificates evidencing such shares being on deposit with the court.

In view of my conclusions with respect to ownership, it follows that since the Swiss courts have so far held that a mandate relationship exists between plaintiffs and the Swiss mandatories, the plaintiffs are entitled as owners to

give orders. Therefore, if plaintiffs and the defendant mandatories agree on the mechanics for taking possession of the certificates for the Leader, North River and Westhold shares, the court will implement them with an appropriate order. The same procedure will govern the delivery by the Receiver of the indentures covering the so-called "duplicate" Leader shares.

Present order on notice.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

THOMAS J. BATA, *et al.*,
Plaintiffs,
v.
DONALD M. HILL, *et al.*,
Defendants.

Civil Order No. 495
ORDER

AND NOW, TO WIT, this 15th day of September, 1958 the Court having rendered an Opinion on June 25, 1958, Plaintiffs having submitted and served on July 25, 1958 a proposed form of order upon the Opinion of the Court of June 25, 1958, Defendant Jan A. Bata having served on August 15, 1958 a written statement of all Jan A. Bata's objections to the order proposed by Plaintiffs under date of July 25, 1958, Plaintiffs having served on August 18, 1958 an amendment to their proposed form of order based upon Defendant Jan A. Bata's statement of objections of August 15, 1958, and the Court duly noting that Defendant Jan A. Bata has declined to accept the condition for depositing securities with the Court laid down in the Court's Opinion of June 25, 1958 for denying Plaintiffs' motion to dismiss and to strike the application of Defendant Jan A. Bata for compensation for his services, that Defendant Jan A. Bata has declined to specify any securities which he would deposit with the Court pursuant to the Court's Opinion of June 25, 1958, and that Defendant J. a A. Bata has declined to make any deposit of securities pursuant to that Opinion, IT IS

ORDERED AS FOLLOWS:

(1) That Plaintiffs' motion to dismiss and strike the petition of Defendants Donald M. Hill and Donald M. Hill, Jr. for allowance for services is denied; any party desiring to oppose this petition of Defendants Hill and Hill, Jr. shall file an answer to that petition within 20 days after the time to appeal from the final judgment on the

merits as to such claims as have been fully litigated herein to date shall have expired without any appeal therefrom having been taken or within 20 days after any such appeal shall have been finally determined; and trial upon any issues raised by the petition of Defendants Hill and Hill, Jr. and any answer or answers thereto shall proceed only after such time for filing answers to the petition shall have expired.

(2) That Defendant Jan A. Bata having declined to accept the condition laid down in the Court's Opinion of June 25, 1958 for denying Plaintiffs' motion to dismiss and to strike the application of Defendant Jan A. Bata for compensation for his services, Plaintiffs' motion to dismiss the application of Defendant Jan A. Bata for compensation is hereby granted and said application of Defendant Jan A. Bata for compensation is dismissed with prejudice to its assertion in this action or hereafter in this State as a claim, lien or charge upon the 1170 shares of Leader A.G., the 2200 shares of Westhold Corporation, or the 5084 shares of North River Securities Corporation, all of which shares are the subject of the Second Amended and Supplemental Complaint in this action.

(3) That Plaintiffs' motion to dismiss and strike the application of Defendant Jan A. Bata for taxation as costs of his counsel fees and disbursements against the property now on deposit with this Court is granted.

(4) That Plaintiffs' petition that certain enumerated payments by them be taxed as costs against Defendant Jan A. Bata is denied.

(5) That the denial of Plaintiffs' motion to dismiss and strike the petition of Defendants Hill and Hill, Jr. for allowance for services does not represent a determination by the Court as to the merits of the claim of said Defendants for compensation for service.

s/ Collins J. Seitz
Chancellor

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

THOMAS J. BATA; THOMAS J. BATA and DAVID H. GRAHAM, as Executors of the Estate of Mary T. Bata; and WESTERN INVESTMENT AND TRADING COMPANY, LIMITED, a Bermuda corporation,

Plaintiffs,

v.

DONALD M. HILL; DONALD M. HILL, JR., DONALD M. HILL and DONALD M. HILL, JR., as Voting Trustees under Voting Trust Agreement for North River Securities Corporation, a Delaware corporation, dated October 22, 1940; CHARLES JUCKER and HANS BERGER, individually, as mandatories in accordance with the law of Switzerland, and as a partnership; NORTH RIVER SECURITIES CORPORATION, a Delaware corporation; WALTER RUNGE, LOUIS F. SPERRY and FRANK A. SELLER; EDWARD N. GOODWIN, NICHOLAS DANFORTH, A. TURNEY SAVAGE, HAROLD J. FAULKNER, WILLIAM F. CLARE, JR., and A. PENNINGTON WHITEHEAD, partners in the practice of law under the firm name of "Goodwin, Danforth, Savage & Whitehead" successor firm to a partnership which practiced law under the firm name of "Campbell, Harding, Goodwin & Danforth"; EDWARD N. GOODWIN and HAROLD J. FAULKNER, as surviving Voting Trustees under a Voting Trust Agreement for Westhold Corporation, a Delaware corporation, dated October 14, 1940; CAGODAN CORPORATION, a New York corporation; WESTHOLD CORPORATION, a Delaware corporation; NEW WORLD INVESTMENTS LIMITED, a Canadian corporation; ROYCAN & Co., a Canadian partnership; N. V. HOLLANDSCHE HANDELMAATSCHAPPIJ BAVE, A Dutch corporation; PER NORGREN, as Liquidator of N. V. HOLLANDSCHE

Civil Action No. 495

DECREE

HANDELMAATSCHAPPIJ BAVE, a Dutch corporation, N. V. NEDERLANDSCHE SCHOEN-EN LEDERFABRIEKEN BATA-BEST, a Dutch corporation formerly bearing the name N. V. SCHOEN-EN LEDERINDUSTRIE AMSTERDAM; JAN A. BATA; TRANSOCEANIQUE S. A., a Luxembourg corporation; HANS BERGER, as Liquidator of Transoceanique S. A., a Luxembourg corporation; and LEADER A. G., a Swiss corporation,

Defendants.

AND NOW, TO WIT, this 26th day of September, A.D. 1958, the above entitled cause having come on to be heard before the Court, upon the second amended and supplemental complaint and upon the respective answers thereto of defendants Donald M. Hill and Donald M. Hill, Jr., individually and as voting trustees, Charles Jucker and Hans Berger, individually, as mandateries in accordance with the law of Switzerland and as a partnership, North River Securities Corporation, Westhold Corporation and Jan A. Bata, and upon the cross-claims and counterclaims, as amended and supplemented, of defendant Jan A. Bata, and upon the depositions taken in the cause and admitted in evidence, and upon the answers to interrogatories filed herein and the admissions of parties, and upon the evidence taken and the exhibits offered by the respective parties and admitted, and the said cause having been fully argued by counsel for the respective parties, and upon mature consideration thereof by the Court and upon all the prior proceedings had herein and upon the Opinion of the Court dated February 14, 1958 and prior opinions filed herein, and upon the proceedings subsequent to the Opinion of the Court dated February 14, 1958 had in connection with the applications for compensation for services of defendants Donald M. Hill and Donald M. Hill, Jr., and of defendant Jan A. Bata, filed respectively April 21, 1958 and June 9, 1958, including the Opinion

of the Court dated June 25, 1958, the Memorandum Opinion of the Court dated May 19, 1958 and the orders of the Court dated April 1, May 22 and September 15, 1958;

And the Defendants Walter Runge, Louis F. Sperry and Frank A. Seller; Edward N. Goodwin, Nicholas Danforth, A. Turney Savage, Harold J. Faulkner, William F. Clare, Jr. and A. Pennington Whitehead, partners in the practice of law under the firm name of "Goodwin, Danforth, Savage & Whitehead" successor firm to a partnership which practiced law under the firm name of "Campbell, Harding, Goodwin & Danforth"; Edward N. Goodwin and Harold J. Faulkner, as surviving Voting Trustees under a Voting Trust Agreement for Westhold Corporation, a Delaware corporation, dated October 14, 1940; Cagodan Corporation, a New York corporation, New World Investments Limited, a Canadian corporation; Roycan & Co., a Canadian partnership; N. V. Hollandsche Handelmaatschappij Bave, a Dutch corporation; Per Norgren, as Liquidator of N. V. Hollandsche Handelmaatschappij Bave, a Dutch corporation; N. V. Nederlandsche Schoen-En Lederfabrieken Bata-Best, a Dutch corporation formerly bearing the name N. V. Schoen-En Lederindustrie Amsterdam; Transoceanique S.A., a Luxembourg corporation; and Leader A.G., a Swiss corporation, having been served by substituted service pursuant to orders of this Court and having failed to appear or answer in this cause and a default judgment having been entered against all of said defendants determining that none of said defendants is entitled to any interest in or is entitled to make any claim relating to any of the subject matter of this action, and a default judgment having been entered against said defendants on the third counter claim and third cross-claim of defendant Jan A. Bata determining that none of said defendants is entitled to any interest in or is entitled to make any claim relating

to any of the subject matter of said counterclaim or cross-claim;

IT IS ORDERED, ADJUDGED AND DECREED as follows:

(1) Plaintiffs herein are the beneficial owners and entitled to the immediate possession of the property which is the subject of this action, namely:

(a) 1170 shares of capital stock of defendant Leader A.G., represented by, or purporting to be represented by, bearer certificates which are presently in the custody of the Register in Chancery of this Court;

(b) 5084 shares of capital stock of defendant North River Securities Corporation, a Delaware corporation, represented by a certificate therefor registered in the names of defendants Donald M. Hill and Donald M. Hill, Jr., as voting trustees under a voting trust agreement which expired by its terms on October 21, 1950, said certificate for said 5084 shares being presently in the custody of the Register in Chancery of this Court; and

(c) 2200 shares of capital stock of defendant Westhold Corporation, a Delaware corporation, represented by two certificates aggregating said 2200 shares and registered in the name of defendant Cagodan Corporation, a Delaware corporation, said two certificates being presently in the custody of the Register in Chancery of this Court.

(2) Defendant Jan A. Bata has no lien in this State upon the property which is the subject of this action and which is described in paragraph (1) above nor has any other defendant named herein any lien in this State upon said property except that defendants Donald M. Hill and Donald M. Hill, Jr. have pending herein undetermined an

application for compensation for services filed April 21, 1958 which claim may hereafter in these proceedings be determined to constitute a lien upon 890 of said shares of Leader A.G. and upon said 5084 shares of North River Securities Corporation and nothing contained in this decree represents any determination by this Court as to the merits of said application.

(3) The Register in Chancery of this Court shall forthwith deliver to plaintiffs or to Robert H. Richards, Jr. and Inzer B. Wyatt, their attorneys, against proper receipt therefor, the several bearer certificates in his custody representing, or purporting to represent, 1170 shares of capital stock of defendant Leader A.G. A certified copy of this order shall be deemed authority for the Register to enter the safe deposit box at Wilmington Trust Company to obtain stock certificates for the purposes of carrying out the provisions of this Decree.

(4) Joseph P. Hurley, Esq., as Receiver appointed by order of this Court on April 25, 1955 (and whose powers and duties were enlarged and amended by order of this Court on June 29, 1955), shall forthwith convey and assign to plaintiffs by proper instrument any and all interest of defendant Jan A. Bata and his wife in and to or with respect to 1170 registered shares of capital stock of defendant Leader A.G. represented by, or purporting to be represented by, the certificate or certificates therefor in registered form now held by BSF Stiftung, said defendant Jan A. Bata and his wife having heretofore (under orders of this Court dated April 25, 1955 and June 29, 1955, respectively) conveyed and assigned to said Receiver any and all interest they may have had in said 1170 registered shares of capital stock of defendant Leader A.G. The instrument of conveyance and assignment executed by the Receiver in compliance with the provisions of this paragraph shall be delivered to plaintiffs or to Robert H. Richards, Jr. and Inzer B. Wyatt, their attorneys,

(5) Joseph P. Hurley, Esq., as Receiver aforesaid, shall also forthwith deliver to plaintiffs or to Robert H. Richards, Jr. and Inzer B. Wyatt, their attorneys, against proper receipt therefor, the two original indentures executed in favor of said Receiver by defendant Jan A. Bata and by other parties under said orders of this Court dated April 25, 1955 and June 29, 1955, respectively.

(6) The Register in Chancery of this Court shall forthwith surrender to defendant Westhold Corporation for cancellation the two certificates representing in the aggregate 2200 shares of capital stock of defendant Westhold Corporation (being the Westhold certificates referred to in paragraph (1) hereof) and upon such surrender for cancellation, defendant Westhold Corporation shall forthwith issue and deliver to the Register in Chancery of this Court a new certificate representing 2200 shares of capital stock of defendant Westhold Corporation registered in the names of Robert H. Richards, Jr. and Inzer B. Wyatt, or the survivor of them, and said Robert H. Richards, Jr. and Inzer B. Wyatt shall each thereupon endorse said new certificate in blank.

(7) The Register in Chancery of this Court shall then deliver to plaintiffs or to Robert H. Richards, Jr. and Inzer B. Wyatt, their attorneys, against proper receipt therefor the new certificate representing 2200 shares of capital stock of defendant Westhold Corporation registered and endorsed in blank as provided in paragraph (6) hereof.

(8) Defendants Donald M. Hill and Donald M. Hill, Jr., shall forthwith cause to be cancelled the three voting trust certificates in respect of 5084 shares of capital stock of defendant North River Securities Corporation which are registered in the names of defendants Walter Runge, Louis F. Sperry and Frank A. Seller, respectively, which are endorsed by them and which are presently held by defendants Donald M. Hill and Donald M. Hill, Jr.

(9) The Register in Chancery of this Court shall forthwith surrender to defendant North River Securities Corporation for cancellation the certificate representing 5084 shares of capital stock of defendant North River Securities Corporation (being the North River certificate referred to in paragraph (1) hereof) and upon such surrender for cancellation, defendant North River Securities Corporation shall forthwith issue and deliver to the Register in Chancery of this Court a new certificate representing 5084 shares of capital stock of defendant North River Securities Corporation registered in the names of Robert H. Richards, Jr. and Inzer B. Wyatt, or the survivor of them, and said Robert H. Richards, Jr. and Inzer B. Wyatt shall each thereupon endorse said new certificate in blank.

(10) The Register in Chancery of this Court shall then deliver to plaintiffs or to Robert H. Richards, Jr. and Inzer B. Wyatt, their attorneys, against proper receipt therefor the new certificate representing 5084 shares of capital stock of defendant North River Securities Corporation registered and endorsed in blank as provided in paragraph (9) hereof.

(11) Each and every counterclaim and cross-claim asserted herein by defendant Jan A. Bata is hereby dismissed.

(12) The four motions (or "counter motions") made by defendant Jan A. Bata to strike certain exhibits are hereby denied.

(13) The two motions made by plaintiffs (later amended and supplemented) to strike certain exhibits and numbered 1 and 4 are hereby denied. The Court will not pass upon the three motions made by plaintiffs (later amended and supplemented) to strike certain exhibits and numbered 2, 3 and 5.

(14) Upon compliance with the provisions of this order, Joseph P. Hurley, Esq. shall be discharged as Receiver herein and may make application to this Court, within two

weeks thereafter for payment for his services as such Receiver and reimbursement for his expenses, and payment for such services and expenses in the amounts allowed by this Court shall be made by plaintiffs.

(15) Jurisdiction is hereby reserved to enter, on proper application, such further order or orders as may be found necessary or appropriate in connection with this cause or the relief herein granted.

(16) Court costs are hereby taxed, pursuant to the Opinion of this Court dated June 25, 1958, against the Plaintiffs.

(17) The provisions of paragraphs (3), (4), (5), (7) and (19) of this Decree are hereby stayed until the receipt by this Court of the mandate of the Supreme Court of Delaware under the provisions of Rule 14 of the Supreme Court finally determining an appeal to be taken herefrom by Defendant Jan A. Bata or until receipt by this Court of a remand of the record together with a certified copy of a Stipulation or Notice of Dismissal of such appeal pursuant to Rule 15 of the Supreme Court. The Stay hereby granted is upon the two following terms and conditions, a failure to comply with either of which to have the effect of rendering said Stay void and of no effect:

(a) Defendant Jan A. Bata shall within five days from the date of the entry of this Decree begin an appeal from this Decree to the Supreme Court of Delaware pursuant to Rule 5 of the Rules of the Supreme Court.

(b) Defendant Jan A. Bata shall within ten days from the date of the entry of this Decree file a supersedeas bond, which may be executed by a surety alone, pursuant to Rule 22 of the Supreme Court in the principal amount of $2,500.00.

(18) The provisions of paragraph (3) insofar as they apply to bearer certificates representing or purporting to

represent 890 shares of capital stock of Leader A. G., and the provisions of paragraph (10) of this Decree are stayed until further order of this Court in proceedings contemplated by paragraph (1) of the Order of the Court dated September 15, 1958 relating to the petition of Donald M. Hill and Donald M. Hill, Jr. for compensation.

/s/ COLLINS SEITZ,
Chancellor.

APPROVED AS TO FORM:

G. C.
Attorney for Jan A. Bata
3000 du Pont Building
Wilmington, Delaware

Attorney for Donald M. Hill
and Donald M. Hill, Jr.
North American Building
Wilmington, Delaware

Attorney for Westhold Corporation
Equitable Building
Wilmington, Delaware

/s/ POOL
Attorney for Charles Jucker
and Hans Berger
948 Delaware Trust Building
Wilmington, Delaware

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAN A. BATA,

Defendant Below, Appellant.

v.

THOMAS J. BATA; THOMAS J. BATA and DAVID GRAHAM, as Executors of the Estate of Mary T. Bata; and WESTERN INVESTMENT AND TRADING COMPANY, LIMITED, a Bermuda corporation,

Plaintiffs Below, Appellees.

No. 48, 1958.

(August 3, 1960)

SOUTHERLAND, *C.J.*, and WOLCOTT and BRAMHILL, *JJ.*, sitting.

Appeal from a decree of the Court of Chancery for New Castle County, adjudging the plaintiffs to be the owners of certain shares of stock. Affirmed, with modifications, and remanded.

George T. Coulson of Morris, Nichols, Arsht & Tunnell, of Wilmington, and Henry Cohen and Daniel M. Sandomire of Cohen and Sandomire, of New York, for appellant.

Robert H. Richards, Jr. of Richards, Layton & Finger, of Wilmington, and Inzer B. Wyatt, John W. Dickey and Edward C. Stebbins, Jr. of Sullivan & Cromwell, of New York, for appellees.

SOUTHERLAND, *C.J.*:

This case presents the latest phase of a long and bitter family struggle for the control of the immense Bata shoe business, a world-wide industrial enterprise founded by the late Thomas Bata of Czechoslovakia. That control is

represented by the majority of the shares of stock of Leader, A.G., a Swiss corporation. Bearer certificates for 1170 of the 2000 issued shares of Leader are physically in the custody of the Court of Chancery. These shares are owned by two Delaware holding companies, Westhold Corporation and North River Securities Corporation, the shares of which are also in that court's custody.

It is admitted that all of the Leader shares were the property of Thomas Bata at the time of his death in 1932. The present claimants to the property in suit are (1) Thomas Bata's son, Thomas J. Bata, and the estate of Thomas Bata's widow, Marie T. Bata, on the one hand; and (2) Jan Bata, half-brother of Thomas Bata, on the other.

For convenience Thomas Bata, Sr. will be often referred to in this opinion as "Thomas"; his son and widow as "Tom" and "Marie", or as "plaintiffs"; and Jan Bata as "Jan" or "defendant".

Litigation growing out of the dispute has been going on for thirteen years. Certain aspects of the case have been decided by the courts of the State of New York, the courts of the Netherlands, and the courts of Switzerland.

The Delaware litigation was brought by Tom and his mother's estate in March 1954, against Jan. There are other parties to the suit, both plaintiffs and defendants, but for our present purpose their status in the litigation is unimportant.

After a trial of 100 days, the Chancellor on February 14, 1958, filed an opinion awarding the disputed shares to plaintiffs. 139 A.2d 159. After further hearings with respect to claims and the form of the decree, final judgment was entered on September 26, 1958. Jan appeals.

Background of the case prior to 1930.

Before dealing with the legal issues before us, we must sketch the factual background of the case.

Thomas Bata was born in 1876 in Moravia, then part of the Austro-Hungarian Empire, later a part of the Republic of Czechoslovakia. The Bata family had been shoemakers for generations.

In 1894 Thomas and a brother and a sister formed a partnership to engage in the shoe business at Zlin, in Moravia. After 1908 Thomas was the sole proprietor. The business thrived. By the time of the First World War it had become the largest producer of canvas shoes in the Empire. During the war the business continued to expand throughout the Empire, so that after the war Thomas had branches of the business in nearly all of the countries that came into being after the dissolution of the Empire. He also opened retail stores in Poland, Roumania, and other countries. These enterprises he carried on in the names of various relatives or associates—a forecast of the secrecy that, to some extent, was to characterize all his foreign operations.

Early in the 1920's Thomas continued to expand in foreign countries and began the practice of incorporating the newly established branches. His consistent method was to place a majority of the shares of each company (about sixty per cent) in his wholly-owned Dutch Company, "Bata Best". Some of the minority shares were registered in his name; other were bearer shares. His holdings of the minority shares, whether registered or bearer, were reported to the Czech authorities.

The profits of these foreign companies were accumulated as bank balances kept in the foreign countries. These profits were kept secret, and were recorded only in private records kept in Zlin (first by Thomas himself and later by Cipera), and called the "Export Department" of the Lynn, Massachusetts corporation, although they had nothing to do with the Lynn company.

By 1931, one year before his death, the value of the business was between $30,000,000 and $45,000,000.

During these years of growth, and also until he died, Thomas Bata was the absolute owner of the entire enterprise and was its dominating force. He was ahead of his time in his concept of the social responsibility of the owner of great wealth. He built homes for his fellow workers, as well as hospitals and theatres. He maintained a profit-sharing system. Perhaps he may be described as a benevolent dictator. He was called "The Chief"; all others were "fellow workers", and there were no titles. His word was law in the organization and at home.

His chief lieutenant was Dominick Cipera. Cipera was related to Thomas by marriage, had been with him since 1919, and held his power of attorney. Close to Thomas also were his half-brother Jan (one of the claimants here) and Muska, his confidential associate in financial matters. Although Jan was his half-brother by his father's second wife, there was a substantial difference in age, and it seems probable that Thomas treated Jan more as a younger son that as a contemporary. In 1909 Jan went to live with Thomas, and remained with him for ten years. He became one of Thomas' trusted lieutenants.

Thomas had married in 1912. His home life was entirely happy and he was apparently devoted to his wife. She was a charming and attractive woman, but with no knowledge of or interest in business. Tom was their only child. Thomas took great interest in his son's development, supervised his education, and, as the Chancellor found, was evidently "grooming" him for an important place in the business.

The formation of Leader.

It is evident that by 1930 Thomas had decided to effect a reorganization of his far-flung industrial empire. But he faced a serious problem.

The large profits of the export business have been referred to. The foreign balances ultimately totaled more

than $7,000,000. These profits were never remitted to the Czech company, and were not even carried on the books of any of the foreign companies. The only record of them was kept in Zlin. No taxes had ever been paid on them. This method of handling the money was in violation of the Czech laws relating to the repatriation of foreign balances, and, of course, in violation of the revenue laws.

Accordingly, in establishing a holding corporation for the great Bata enterprise secrecy was required. The solution was found in the creation of Leader, a Swiss corporation. It is reasonably apparent, as the Chancellor said, that Thomas sought the "financial asylum" of neutral Switzerland in the "political and economic turmoil" of the time; and that in so doing he was motivated both by a desire to conceal his assets and by an intent to evade taxation. Accordingly, on the advice of Swiss counsel, Dr. Wettstein of Zurich, Leader was formed, with a capital stock of 2,000 bearer shares.

A majority of the shares of each of the Bata companies outside of Czechoslovakia was transferred to it, as well as the foreign bank balances. An arrangement was devised to prevent the disclosure of the transactions. All of the Leader shares (except for four qualifying shares) were delivered to Thomas. He acknowledged receipt of 890 shares for the account of Bata Best, and of the remaining shares for his own account. An elaborate scheme, involving pledges of the shares, was adopted to conceal Thomas' ownership. The Swiss lawyers, appearing to be the stockholders, acted as "mandatories" for Thomas, *i. e.*, were bound to follow his directions with respect to the shares. Although Bata Best entered its holdings of these shares on its books, the certificates were actually deposited in a Zurich bank in the custody of Muska.

But the creation of Leader was only a partial solution. What would happen upon Thomas' death? His estate would be confronted with the same problems—not only

disclosure of the foreign assets, but also crippling inheritance taxes. There is evidence that he was much concerned about such taxes. The rate applicable to an estate inherited by his wife and son would be 26%; the rate on property left to a brother would be 38%. On the other hand, a tax on a written contract of sale during lifetime would be only 2%. (An oral contract was exempt from tax.)

In the light of these circumstances Thomas determined upon a very unusual course, as will shortly appear.

Death of Thomas Bata; the memorandum of sale and the will.

Thomas Bata died in an airplane crash on July 12, 1932, at the age of 56. He was in good health and expected to continue in his business. Tom was 17 years old and was working for Bata in Switzerland. Jan was about 34 years of age. He had been in the business for a number of years and had become one of Thomas' trusted associates, though probably not so important a lieutenant as Cipera.

When Thomas Bata died the only key to his office safe was on his person. Cipera obtained it from the hospital and in the afternoon of July 12 the safe was opened by him. There were also present, Jan, Dr. Foerster, the Notary, and others (not including Mary).

There were found in the safe two sealed envelopes. The first was addressed to Jan. It was opened and found to be a memorandum dated May 10, 1931, purporting to evidence a sale to Jan Bata of all of Thomas' property, except certain real estate, for 50 million crowns (about $1,500,000 in United States money), to be paid within one year.

It consisted of two pages and was entirely in Thomas' handwriting. Some of those present read it and signed their names. Cipera endorsed it: "In our presence on 7/12, 32 opened by Jan A. Bata." According to one of

those present Jan expressed great surprise. At the suggestion of Dr. Foerster, Jan wrote on the document: "I agree and purchase, Jan A Bata." On the next day Jan added the words: "That is to say, I agreed and purchased as per oral agreement."

A second sealed envelope was found in the safe, endorsed in Thomas' handwriting: "My last will." It was delivered to the Notary, and was officially opened and read the next day. It was dated May 19, 1931. It consisted of two pages, entirely in Thomas' handwriting. It recited that his estate consisted of a claim against Jan Bata amounting to 50,000,000 crowns, and left various legacies to his widow, his son, and others.

There was also found in the safe a document setting forth Thomas Bata's philosophy with respect to the responsibilities of the owner of a great industrial enterprise. This was his "Moral Testament." It will be discussed later.

It was established in the New York litigation, and is admitted here, that the purported sale by Thomas to Jan in Thomas' lifetime was a fiction. It was evidently devised by Thomas, as indicated above, for the dual purpose of concealment and tax evasion. The legal effect of these two papers is the question at the heart of this controversy, and will be considered later. At the moment we set forth the steps taken by the heirs and Jan in the settlement of the estate. As will appear, these steps were such as to carry out Thomas' scheme for concealment and tax evasion.

Czech Probate Procedure.

Probate proceedings under Czech law are quite different from ours. There is no executor or administrator. A "will" is an instrument disposing of all the estate or of a fractional part of all the estate. A "codicil" bequeaths legacies, but does not name heirs. The instrument

left by Thomas Bata was therefore a codicil. Nevertheless, we shall for convenience refer to it as "the will."

If the testator leaves only a codicil, his heirs succeed to his entire estate as "universal successors," and are responsible for the payment of legacies.

After the death of a decedent there is a period of suspense in the settlement of the estate until the heirs come forward in the appropriate court and make a declaration of heirship. Once this is done, the probate court then determines, upon considering the testamentary documents, whether or not the declarants are truly the heirs of the decedent. If the document bequeaths only legacies then the determination by the court is that the declaring heirs are intestate heirs.

Once the heirs have been established, they have an option to proceed in either of two ways. They may take the decedent's estate with benefit of inventory, which means that the assets of the estate are appraised and listed, and thereafter the heirs are liable to the decedent's creditors only to the extent of the appraised estate.

The second alternative is for the heirs to accept the decedent's estate unconditionally. This means that the heirs succeed to all of the property of the decedent of whatsoever kind, conditioned upon their obligation to pay and discharge all debts and legacies. The heirs file an unsworn statement of assets, called a "statement in lieu of oath."

It is highly significant that if the heirs accept an estate unconditionally, the probate court does not inquire into the extent of the estate by means of an inventory. If they accept the estate conditionally, then a valuation of the estate is required under Czech probate practice.

If one or more of the heirs is a minor at the time the declaration of heirship is made, then the probate court will not permit an unconditional acceptance of the estate in behalf of the minor but will insist upon an inventory and valuation of the estate. The reason for this is obvious,

i. e., the court will not permit a minor to be saddled with excess debts over the property he is to receive.

One further feature of Czech probate law should be noted. A decedent may not disinherit his children. This means, in the case of Thomas Bata, that his son, Tom, was entitled to ⅜ of the value of the entire estate.

Upon completion of these proceedings, the estate is delivered to the heirs by deed of delivery signed by the court. This deed under Czech law has the effect of vesting in the heirs title to *all* the estate, whether or not mentioned in the deed.

Settlement of the estate.

The heirs and Jan proceeded with the settlement of the estate and the payment of taxes. On July 18, 1932 Jan sent to the taxing authorities a copy of the sale memorandum of May 10, 1931, asserting no tax was due because he had bought the property by oral contract in Thomas' lifetime. The taxing authorities naturally refused to accept this contention, and considerable negotiation followed. Finally, the tax liability was compromised about a year later by assessing a 2% tax on the value of the property pretended to have been sold to Jan. That value was fixed at 274,540,264 crowns—about $8,200,000 in our money.

In September 1932, steps were taken looking to the filing of the declaration of heirship. By appropriate court action under Czech law, Tom was declared of age on September 21, 1932, shortly after he became eighteen. This was done, the Chancellor found (and we think correctly), primarily to enable Tom and his mother to accept the estate unconditionally and thus avoid the court inventory of the estate. Such an inventory would have disclosed the gross under-valuation of the property listed on the sale memorandum and might well have led to the disclosure of the Leader holdings and a tax so large as to cripple the Bata enterprise.

The tax settlement was reached some time in the late spring or summer of 1933. On June 8, 1933, the declaration of heirship was filed, accepting the estate unconditionally, and on the same day was approved by the court.

On June 23 the required "statement in lieu of oath" was filed. This statement described the principal item of the estate as a "claim upon the firm of Bata a.s. in Zlin in the amount of Kc. 57,262,131." The language of the declaration recited that Jan "had settled this amount with the firm Bata * * * to the benefit of the testator * * *."

In effect, what was done was to charge Bata a.s. with Jan's supposed debt to Thomas, and also with the approximate amount of the other assets listed in the will. This was done "as of May 10, 1932" by a debit entry in Jan's account with Bata a.s. This was obviously done to make it appear that a sale had been completed before the death of Thomas.

In accordance with the sale memorandum, the minority shares of most of the foreign operating companies that stood in Thomas' name, were transferred by Tom and Marie to Jan. Jan appears to have taken possession without objection of the minority bearer shares, or at least some of them. The majority shares were, as above noted, held by Leader. Jan took control of Bata a.s. No certificates of this company had ever been issued, and none were issued until some years later.

All dividends declared in respect of the minority shares were credited to Jan's account with Bata a.s.

Finally, Jan succeeded to Thomas' position of control with respect to the Swiss mandatories—the apparent holders of the Leader stock. No steps were ever taken, however, to transfer the ownership of any of the Leader shares to Jan.

The foregoing steps relate to the supposed *inter vivos* sale. The provisions of the will also had to be carried out.

The will purported to dispose of an estate of about

57 million crowns, consisting largely of Jan's supposed debt, thereafter assumed by Bata a.s., as above noted.

The deed of delivery of June 28, 1933, reciting the debt as settled with Bata a.s., stated that the property of Thomas Bata appeared as a claim against the firm. The deed specified the distribution of the estate according to the terms of the will. The deed also provided for the payment of any debts of the estate by Tom and Marie, and for the payment of estate duties by the heirs and legatees.

The actual distribution of the estate by the parties did not follow the will in several respects.

First, there was a substantial debt owing by Thomas to Bata a.s., at the time of his death. At the end of 1932 it was about 27 million crowns. Tom and Marie were legally obligated to pay it, but payment would have wiped out their cash legacies. The amount of the debt was charged to Jan's account on Bata a.s., and Thomas' account was credited with payment.

Second, certain of the real estate devised to Marie was not in the name of Thomas, but in Bata a.s. These properties were nevertheless transferred to her, together with the Zlin dwelling house, which was not devised to her in the will.

Third, inheritance taxes were legally payable by Tom and Marie. There were set up on the books of Bata a.s. accounts crediting Tom and Marie with the amounts of the cash legacies (and in Marie's case with the value of the real estate transferred by Bata a.s.). Against these accounts inheritance taxes were charged, but offsetting credits for the benefit of Tom and Marie were set up on the books of Leader.

Fourth, although on the face of the will the sole cash provision for the widow was the legacy of 5 million crowns, many of her living expenses during the succeeding years were charged to Bata a.s., as had been the practice in Thomas' lifetime.

It is clear from these facts that after Thomas' death all parties in interest cooperated to carry into effect the scheme of secrecy and tax evasion devised by Thomas—as, indeed, it was to their interest to do so.

Jan's control.

After Thomas' death Jan became the active manager of the enterprise—the "Chief", as Thomas Bata had been. Čipera and Muska continued to be the chief assistants. Tom's education was completed in 1933, and he entered upon a career of training in the business.

Thus, Thomas Bata's scheme was carried into effect.

For several years all appears to have gone well. The enterprise continued, as before, as a family concern. The Chancellor found that during these years the parties were indifferent to the questions of legal ownership, and the evidence, we think, justifies that finding. But it is not surprising that the artificiality of the transaction and the deception that had been practiced led ultimately to conflicting claims of ownership. In 1939 there was a quarrel between Jan and Tom. Tom was discharged. He apologized and was reinstated. Much is made of this, but its chief significance to us seems to lie in the fact that it was merely an incident that led to the inevitable.

The war years furnished the immediate occasion. In 1939, Jan, Tom and Marie went to the Americas. In 1941 Jan went to Brazil. After the outbreak of the Second World War, the German occupation of Czechoslovakia resulted in inquiries from the British authorities into the ownership of the Bata enterprise. These inquiries were not satisfactorily answered, and Jan was put on the British and American black lists. Despite the urgent pleading of Muska, Jan (then in South America) stubbornly refused all pertinent information, insisting that the ultimate ownership of Bata lay with a Swiss "consortium", and that no disclosure should be made of the real ownership of the Leader shares, which represented ownership

and control. The result was, as the Chancellor found, that Tom, then in Canada, succeeded to control of the business almost by default.

Litigation.

Finally in 1947, after the war, Tom and his mother filed a suit in Switzerland to test the right of Jan to give instructions to the Swiss mandatories.

In the meantime, in 1942, Muska had died in New York. Bearer certificates representing 826 shares of Leader were found in his safe deposit box in that city. How they came to be there is an involved story that does not concern us. In May 1947, Tom and Marie filed suit in New York to recover them.

A third suit was filed by Tom and Marie in the courts of the Netherlands in 1949.

The results of these lawsuits, and their bearing on the controversy before us, will now be considered.

The Prior Judgments.

As might be expected, the prior lawsuits raise questions of *res judicata*.

To understand the pertinency of these holdings a statement of the parties' basic contentions here on the merits will be set forth.

The plaintiffs claim the shares in issue as universal heirs of Thomas. Jan makes three claims. His principal contention, and the only one pertinent to the question of *res judicata*, is that the sale memorandum and the will found in Thomas' safe, particularly when read in the light of the "Moral Testament", should be construed under Czech law to create a "sales legacy" to Jan of the entire Bata enterprise.

Applicable Czech law is largely found in the Austrian Civil Code, which is often referred to as "A.B.G.B.". There is, however, no Code provision dealing with the con-

cept of sales legacy. It appears to be denominated indifferently as a "purchase legacy", "sales legacy", or "purchasa right". Under our law, we suppose, it might be called a testamentary right to purchase.

Each of the parties invokes the rule of *res judicata*, or that aspect of it now called in American law "collateral estoppel". See *The Restatement, Judgments*, ¶68 (1).

Tom claims that the issue of "sales legacy" was, either expressly or by necessary implication, decided against Jan in the New York litigation. Jan claims that it was expressly decided in his favor in the Netherlands litigation. It is admitted that the Swiss judgment is not *res judicata*.

The following is a brief summary of these three lawsuits:

(a) The New York suit concerned certain shares of Leader. The heirs claimed title as universal heirs; Jan claimed title by oral contract of sale with Thomas in the latter's lifetime. The heirs prevailed. Basically the New York courts decided (1) that the heirs took title to the shares; (2) that there was no oral contract of sale between Thomas and Jan; and (3) that the heirs were not equitably estopped to assert their claim.

(b) The Dutch suit concerned shares of the Dutch company. They were awarded to Jan, basically on the theory of "asquisitive prescription", *i.e.*, legal possession for three years. The Court also made other findings, including one that the will and sales memorandum created a sales legacy.

(c) The Swiss suit concerned the right of Tom as "mandator" to give instructions to the Swiss mandatories. It was decided in favor of Tom. A defense of Jan based on the sales legacy contention was rejected.

We consider first the New York judgment.

The New York Judgment.

On May 27, 1947 Marie and Tom filed in the New York Supreme Court a suit to recover from the Chase Safe

Deposit Company the certificates for the 826 shares of Leader stock that were found in Muska's safe deposit box after his death. Jan and others were interpleaded.

Marie and Tom asserted ownership, as above stated, as universal heirs of Thomas Bata. Jan's claims, though not specifically set forth in his answer, were these:

(1) That he was the owner of the shares by an oral contract of sale made during the lifetime of Thomas Bata; (2) that the deed of delivery of June, 1933, effected a constructive transfer to him of all the assets of Thomas; and (3) that Marie and Tom had with full knowledge participated in the carrying out of the transfer to him of certain assets of the estate and were estopped to question his title.

The trial court resolved all these issues against Jan. In particular the trial judge found, as to defense (3) that Marie and Tom had been deceived by Jan and did not understand the nature of the estate and tax proceedings. See 99 NYS 2d 535.

On appeal the first two findings were affirmed; but the findings of Jan's fraud prior to 1939 and of Marie's and Tom's ignorance of the matter was reversed. As to the estoppel, the Appellate Division, carefully confirming its holding to the shares in suit, held that the conduct of the parties did not alter the devolution of those shares. Two of the five justices dissented. 279 App. Div. 182.

We can find nothing in the opinions of the trial Court and Appellate Division to support Tom's claim that the issue of sales legacy was raised or considered, much less decided. In fact the trial Court expressly stated that Jan's claim was not founded either on the sale memorandum or on the will.

The case in the Appellate Division was decided on December 4, 1951. Jan appealed to the Court of Appeals. It was argued on May 21, 1953. Shortly before that, on April 28, 1953, the Dutch District Court decided in Jan's favor the suit filed in Holland by Marie and Tom. It held among

other things that the memorandum and the will evidenced a sales legacy to Jan. This Dutch opinion was submitted to the New York Court of Appeals. Apparently the legal theory of sales legacy was advanced by Jan for the first time in his reply brief.

A reading of the opinion of the Court of Appeals shows, as the Chancellor said, that the case was finally and basically decided on the ground that no contract of sale was proved and that the plaintiffs were not estopped to claim the shares. Thus the Court said: "Both lower courts have found that neither the May 10th writing nor the will constituted a valid, enforceable contract under Czech law". Whether the two documents together created a sales legacy under Czech law was certainly not explicitly decided. Indeed, Tom and Marie argued that the issue was not properly raised for the first time on appeal, and, as the Chancellor said, it is not clear that this contention was rejected.

Tom makes the additional argument founded upon the rule of strict *res judicata*. He says that even if the issue of sales legacy was not litigated and decided in the New York action, yet the New York judgment is binding here as to all claims, litigated or not, because a contrary judgment here would impair rights or interests established in the first action. *Schuylkill Fuel Corp.* v. *B. & C. Niebera Realty Corp.*, 250 NY A. 304, 165 NE 456. Justice Cardozo's opinion in the cited case shows that the rule invoked is inapplicable here. He says:

> "A judgment in one action is conclusive in a later one, not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first. Cromwell *v.* County of Sac, 94 U.S. 351, 24 L.Ed. 195, Reich *v.* Cochran, *supra*. It is not conclusive, however, to the same extent when

the two causes of action are different, not in form only (Baltimore S.S. Co. *v.* Phillips, *supra*, page 321 of 274 U.S., 47 S.Ct. 600), but in the rights and interests affected".

The Chancellor held that in the Delaware suit we are not only dealing with different property, but we are dealing with a legacy claim, whereas the New York judgment decided a contract claim. See *Cromwell* v. *County of Sac*, 94 US 351, 24 L.Ed. 195.

In view of our ultimate conclusion on the merits, further discussion of the New York suit is not required. It is enough to say that we are in complete accord with the Chancellor's statement of the applicable law and his conclusion that the New York judgment does not preclude consideration of the sales legacy question on the merits.

The Dutch Judgment.

In 1959 Marie and Tom filed suit in Holland against Jan. The case presented the issue of ownership of certain shares of the Dutch Bata Company—"Bata Best".

The disputed shares were adjudged to belong to Jan. In so holding the Dutch Court of Appeal found, among other things, that the sale memorandum and the will should be construed as creating a sales legacy to Jan. This latter holding, Jan claims, is *res judicata* here by way of the doctrine of collateral estoppel. Tom asserts the contrary.

This issue—simple enough to state—presents several very difficult questions. We entertain no doubt that a foreign judgment, given by a court under a system of law reasonably insuring notice and hearing, as distinct from an issue decided in the course of rendering that judgment, is *res judicata* in Delaware, despite a dictum to the contrary in an early Delaware case. See *Hilton* v. *Guyot*, 159 US 113, 16 S.Ct. 139, and note in 46 ALR at page 439. But the question of applying collateral estoppel to a

foreign judgment is, we think, not so simple, despite defendant's able argument to the contrary.

Before dealing with this question, however, it will be helpful, first, to examine the opinions of the Dutch courts in order to determine just what those courts decided: and, second, the Chancellor's answer to the question.

In the District Court in Holland Jan first advanced three claims: an *inter vivos* purchase; acquisitive prescription, *i.e.*, legal possession for three years; and forfeiture of rights. Some months later an additional claim of sales legacy was alleged as an alternative theory.

The District Court sustained the defense of forfeiture of rights. The first and principal part of its opinion deals with this point. It then went on to say that the verbal contract of sale was "plausible", and that even if it were not, the two documents would "leave scope" for the view that they contained a sales legacy to Jan.

Tom and Marie appealed. The Court of Appeal delivered a long and carefully considered opinion, consisting of 118 paragraphs.

The Court of Appeal held first that it was Thomas' intention that Jan should succeed him as owner of his property. It held that the verbal contract asserted by Jan had not been proved, but then held that the will contained a purchase legacy in favor of Jan which he had accepted. Under §684 of the Czech Code a legatee, upon the death of the testator, acquires a *right* to the legacy, but *ownership* may be acquired only in accordance with provisions of Chapter Five of the Code, which requires delivery, *i.e.*, a valid legal transfer. As the Chancellor said, the Court of Appeal, having found a sales legacy, would normally have then proceeded to consider the question of a valid transfer perfecting Jan's title. Tom and Marie had denied any valid transfer. The court did not, however, proceed to consider this question, but instead took up the alternative contention of Jan that even if there had been no legally valid transfer of the legacy, he

had become the owner of the shares by acquisitive prescription.

Section 1466 of the Czech Code reads:

> "He who has legal possession of a movable thing for three years becomes the owner thereof by prescription".

The Court recited the facts respecting the assignment of the shares to Jan and his possession and control, and rejected the heirs' contention that Jan was a mere nominee or holder for their benefit. It concluded:

> "From the above consideration it follows that in any case, regardless of the manner in which he obtained the possession of the shares concerned in the lawsuit, in virtue of par. 1466 A.B.G.B., he had since become the owner of these shares".

The court, nevertheless, proceeded to the question of "valid delivery" of the shares in suit and held that there had been such delivery.

In a later part of the opinion, the court, observing that the question of forfeiture of rights was no longer of importance, nevertheless held that the District Court's decision on this point was correct.

It will be seen that the Court of Appeal made a series of determinations respecting a number of issues presented by the case. The question is whether one or more of these determinations shall be deemed conclusive in this litigation under the rule of collateral estoppel.

We turn to the Chancellor's determination of this issue.

Preliminarily, we note that the Chancellor in his discussion of the matter distinguished between the term "*res judicata*" and "collateral estoppel". Although collateral estoppel is but an aspect of the general rule of *res judicata*, we shall adhere to this terminology because, as will appear, the distinction is quite useful.

The Chancellor first noted the general rule that judgments of a foreign country are recognized under principles of comity. *Iowa-Wisconsin Bridge Co.* v. *Phoenix Finance Co.*, 41 Del. 527, 25 A. 2d 383. They are not within the protection of the "full-faith and credit" clause of the federal constitution. *Aetna Life Ins. Co.* v. *Tremblay*, 233 US 185, 32 S.Ct. 309. As the Chancellor said, "comity" really means that Delaware is free to adopt whatever rule it desires with respect to the effect to be given foreign judgments. 2 Beale, *Conflict of Laws*, ¶434.1. He then referred to the established rule that a foreign judgment is to be given only such binding effect as would be accorded to it by courts of the jurisdiction rendering the judgment. This Court has so held. *du Pont* v. *du Pont*, 47 Del. 231, 237, 90 A.2d 468, 471.

This led him at once to the question whether the courts of Holland, in a subsequent suit between the same parties on a different cause of action, would give binding effect to the holding of sales legacy by the Dutch courts. This question, admittedly one of some difficulty, he did not decide. Assuming, without deciding, that the Dutch courts would apply the rule of collateral estoppel, he passed to the question: Under what circumstances, if any, should our courts accord binding effect to judgments of a foreign country?

He assumed that the rule of *res judicata* would in modern times be applied to foreign judgments, notwithstanding a dictum to the contrary in an early Delaware case (*Pritchett* v. *Clark*, 3 Harr. 517), but noted the difficulties in applying the rule of collateral estoppel to such judgments, particularly in cases in which there are (as here), contrary holdings in two foreign countries.

For this and other reasons he concluded that Delaware should not give automatic effect to the finding of sales legacy by the Dutch courts, and would examine the circumstances to determine what recognition should be accorded the Dutch judgment.

This is the basic holding of his opinion on the point of *res judicata* as applied to the Dutch judgment.

However, he also considered the effect of the "reciprocity" rule, *i. e.*, the rule that a judgment of a foreign country will be given such effect in an American court as the courts of that country would accord to an American judgment. *Hilton* v. *Guyot*, 159 US 113, 16 S.Ct. 139. He held that the Dutch judgment would not be binding under the rule of reciprocity, because the Dutch courts would not be legally *required* to give binding effect to a Delaware judgment, such recognition being a matter of discretion with the Dutch courts.

A similar test, he then held, would be applied to the Dutch judgment, *i. e.*, it should be evaluated in the light of the circumstances to see what effect, if any, should be given to it. He examined the findings in the Dutch opinions, considered the Swiss decision, and in the light of all the circumstances, concluded that as a matter of judicial discretion, he should not treat the Dutch determination of sales legacy as binding.

This ruling is earnestly assailed as error.

As will appear later, we are of opinion that the Chancellor's conclusion—that the Dutch judgment is not *res judicata* here is correct. But we are unwilling to approve all of the reasoning upon which he based his conclusion.

First, as to the rule of reciprocity. Plaintiffs do not claim that the Chancellor adopted this rule and based his decision upon it. They argue that the existence of the reciprocity rule justifies the discretionary rule applied by the Chancellor.

The reciprocity rule rests upon the high authority of the Supreme Court of the United States. *Hilton* v. *Guyot*, 159 US 113, 16 S. Ct. 139. In a five to four decision the Court held that a French judgment against an American citizen was only *prima facie* evidence in an action upon it in the federal courts, on the ground that by the law

of France our own judgments were reviewable on their merits. The holding appears to be based on the desire to protect American nationals and to be limited to cases in which it is invoked by an American citizen. It, therefore, may not be invoked here, since plaintiffs are not citizens of the United States. See *Desconto Gesellschaft v. U. S. Steel Corp.*, 300 F. 741, 747.

Moreover the rule has been severely criticized by commentators in the field of conflict of laws. See 2 Beale, *Conflict of Laws*, ¶434.2 ("an anomaly in our law"), and *Goodrich on Conflict of Laws* (3d Ed.), ¶208 (dissenting opinion "well founded"). It has not been followed in New York. *Johnston* v. *Compagnie Generale Transatlantique*, 242 NY 381, 152 NE 121, 46 ALR 435.

We note that the *Hilton* case holds that foreign judgments are ordinarily entitled to the same respect in this country as judgments of the courts of the states of the union. This is the general rule. See annotation in 46 ALR at p. 439. The Hilton case merely announced a special exception to this rule in favor of American nationals.

We do not agree with plaintiffs' contention that this holding supports the discretionary rule applied by the Chancellor. His conclusion rests upon other considerations. He reasoned as follows:

> Although collateral estoppel, like *res judicata*, has the merit of bringing litigation to an end, yet it often works harsh results (*The Evergreens* v. *Nunan*, 141 F.2d 927), and automatic recognition of foreign judgments may force a distasteful duty upon the court (*Gioe* v. *Westervelt*, 116 F. 1017). Since it is a judicially created rule, it should not be employed to dignify form at the expense of substance. also, in the field of foreign law the controlling law may not be the law of the jurisdiction rendering the first judgment.
>
> These general considerations have weight in emphasizing that the rule of collateral estoppel, often difficult of

application to domestic judgments (see Judge Learned Hand's analysis in *The Evergreens case, supra*), presents additional difficulties when sought to be applied to foreign judgments. Cf. the comment on the Chancellor's opinion in 72 *Harvard L. Rev.* 573. But they do not seem to us to justify the conclusion that a question of *res judicata* (using that phrase in the broadest sense) should be resolved by the exercise of judicial discretion. In *Johnston v. Compagnie Generale Transatlantique, supra,* the Court of Appeals, referring to a prior case involving a French divorce decree, said:

> "Full force and effect was given to the French decree. The court in the end, however, disposed of the case in the exercise of discretion. It seems illogical to leave the effect of a foreign judgment in personam in individual cases to the discretion of the court".

In addition to the considerations above mentioned, the Chancellor gave considerable weight to one specific difficulty that may arise in applying collateral estoppel to foreign judgments. Suppose, as here, that there are two foreign judgments reaching opposite conclusions upon the point in question. Which is to be given effect? The general rule as to conflicting judgments on the same cause of action is that the second is to be given effect, and this rule has been applied to foreign judgments in at least one American decision. *Ambatielos v. Foundation Co.*, 116 NYS 2d 641. The rule appears to be based upon the theory that the effect of the first judgment has been determined in the second suit, *i.e.*, the rights acquired under the first judgment have been terminated. 2 *Freeman on Judgments*, ¶ 629. If this rule is applicable to cases of collateral estoppel arising out of foreign judgments, the Swiss Superior Court decision of 1957 would supersede the Dutch decision.

But Switzerland does not recognize the rule of collateral estoppel, and therefore its judgment is not entitled here to binding effect. Plaintiffs admit this. How, then,

is the rule of conflicting judgments to be applied justly in such a case? The Chancellor pointed out forcefully the inherent difficulties in such a situation.

It has been suggested that in the face of two conflicting foreign determinations, involving a common question but different causes of action, the court of the forum should disregard both and should proceed at once to the merits. See the comment on the Chancellor's opinion in 72 *Harvard L. Rev.* 573, above cited. The Chancellor did not deal with the point, probably because the Swiss Superior Court opinion (as distinct from the judgment) was not handed down until March, 1959. Accordingly, we lay this question aside. It is not fully discussed in the briefs, no doubt for the same reason that the Chancellor did not deal with it. We shall consider only the Dutch judgment.

But, again, we do not think that this difficulty, *i.e.*, the existence of two conflicting foreign judgments, justifies the application of a discretionary rule in determining their effect as *res judicata*. That difficulty may well justify the Court of the forum in refusing any binding effect to either judgment; but discretionary enforcement, in our opinion, is open to serious objection.

The rule of *res judicata*, in any aspect, is a rule of repose, designed to end litigation. What becomes of this rule if the court of the forum is to examine all the circumstances attendant upon the rendition of the foreign judgment? Inevitably, the court is drawn into an analysis of the correctness of the decision. And just as inevitably, we think, the tendency would be to reject a foreign judgment because of error in its law or its facts—the very thing that *res judicata* is designed to foreclose. Indeed, that is in effect what the Chancellor did. Of course, he fully realized that if the rule of collateral estoppel were applicable, this could not be done. But under the rule of discretion it would be proper. With many of the Chancellor's comments on the Dutch judgment we are in general agreement, as will appear hereafter. But this is not

the point here. If collateral estoppel is to be applied to foreign determinations at all, we think that it should be applied, in general at least, under definite principles of law.

We turn to the question: Is collateral estoppel applicable in any respect to a determination of a foreign court?

At the outset we note the difference between Anglo-American law and the law of continental countries derived principally from written codes. The English and American law of collateral estoppel, though no doubt sometimes different in application, is fundamentally the same. But "collateral estoppel" *as such* does not appear to be recognized in the civil law. See the articles by Professor Millar, "The Premises of the Judgment as *Res Judicata* in Continental and Anglo-American Law", 39 *Mich. L. Rev.* 1-36; 238-266. He finds that the prevailing rule in continental countries (although subject to exceptions) is that the effect of a judgment as *res judicata* is restricted to its dispositive part, as distinct from the premises on which it rests. Indeed, certain counsel for Jan in this case appeared on one occasion to be of that opinion. And a British writer has suggested that a foreign judgment should be deemed conclusive only "of the immediate and direct object of the litigation". Gutteridge, "Reciprocity in Foreign Judgments" (1932), 13 British Yearbook International Law, 50, 63.

This would be a simple solution to a difficult problem, but its application would in some cases permit a defeated litigant to relitigate an issue which was fundamental to the determination of the foreign judgment and which was fairly and clearly resolved against him. This result does not appear sound.

We see no reason in principle why the rule of collateral estoppel should not in a proper case be applied to a foreign judgment. It is quite true, as the Chancellor said, that there is scant American authority dealing

directly with the question. But what authority there is favors the application of the rule. See Reese, "The Status in this Country of Judgments Rendered Abroad", 50 *Col. L. Rev.* 783, 789; cf. *The Restatement, Conflict of Laws*, ¶2, ¶450. *Newton* v. *Hunt*, 112 NYS 573. In the *Newton* case the Appellate Division recognized without hesitation the binding force of a finding of fact in a prior suit in a British court.

We are unwilling to hold that the rule of collateral estoppel may never be applied to a foreign judgment. The same fundamental consideration—the end of litigation—applies as well to collateral estopped as to *res judicata*.

But in applying it to a judgment rendered under the civil law caution is dictated. This caution is suggested by Professor Millar's discussion of the problem. Moreover, there is a marked difference between the Code system of civil law and the common law system derived from case law. The apparent absence of citations of decided cases in continental opinions may well create especial difficulty in determining, first, the scope of the foreign determination, and second, the effect that would be later given to it by the foreign courts.

With these general considerations in mind, we turn to the question whether the finding of sales legacy in Holland is binding here.

Two questions must be answered: (1) Do the Dutch courts apply a rule of collateral estoppel to their own determinations? (2) If so, is the finding of sales legacy one which would be given such effect?

(1) Questions involving claims of *res judicata* in the Netherlands courts appear to be governed primarily by the Code. Section 1954 provides:

> "The authority of *res judicata* does not extend beyond the subject matter of the judgment. To be able to invoke such authority, it is required that the thing claimed is the same, that the claim is based

on the same cause and be made by and against the same parties in the same quality".

Notwithstanding the limited scope of the Code, the Supreme Court of the Netherlands has construed it to cover cases in which the controlling question decided is the same in both suits, although the cause of action is different. The test of identity applied, as stated in a 1926 decision of that court, it embodied in the phrase: "the all-governing question in dispute".

We have examined the four decisions of the Supreme Court cited to us. Each decision involved a second suit founded solely upon the identical question that had already been decided. For example, a suit to recover against a guarantor an installment due under the guaranteed obligation was dismissed on the ground that the guarantee had lapsed. A second suit was brought on another installment, and the first decision was held to be *res judicata*. In another case a defendant sued as a tenant on eviction proceedings established that no lease had existed between him and the plaintiff. In the second suit to recover rent the first decision was held *res judicata*.

In a third case the subsequent suit, although founded on a different cause of action, involved a question already decided, viz., the character of a testamentary bequest.

The fourth suit involved a prior decision rejecting a counter claim seeking recission of an agreement. The first decision was held to be *res judicata* in a second suit asserting the same counter claim.

These decisions, we think, fall short of clearly establishing as Dutch law the rule of collateral estoppel that obtains in many, probably in most, American jurisdictions. See 2 *Freeman on Judgments*, ¶688: "the conclusiveness • • • extends to every question in issue and determined by the court". Our extensive body of law on the question of which issues are *res judicata* bristles with close and difficult questions of distinction between "evidentiary" or

"collateral" facts or "mediate data", as opposed to "ultimate facts". By contrast, Dutch rule seems narrower, and limited to cases in which the "all-governing" question is the same. Compare the discussion by Professor Millar in the article above cited.

The experts who testified below were in substantial agreement that the test of *res judicata* in Holland is the identity of "the all-governing question in dispute", or of the equivalents of this phrase: "the overriding issue", or "the all-dominant question". (Plaintiffs' expert added the word "single", *i.e.*, "the single all-governing question", but this word does not seem to occur in the cases, and we rest nothing upon his use of the word.)

Of course the experts are in disagreement as to what was the all-governing question in the Dutch suit.

Counsel for defendant cite some statements of legal commentators, and insist that the Dutch rule, like the majority rule in this country, extends to any finding necessary to sustain the judgment. It is quite doubtful whether these comments are intended as opinions that the Supreme Court of the Netherlands has broadened the rule of *res judicata* to that extent. At all events, we decline to adopt a rule not clearly or satisfactorily enunciated by the Supreme Court of the Netherlands.

(2) Our second question is whether the finding of sales legacy would be given the effect of *res judicata*. Our inquiry must therefore be: Was the issue of sales legacy the "overriding issue" in the Dutch Court of Appeal's decision?

The opinion embodies the following findings:

1. It was Thomas Bata's intention that Jan should succeed him as owner of the Bata enterprise.

2. Jan's claim of a sale *inter viros* is not established.

3. The will and sales memorandum embody a *legatum venditionis causa*—a sales legacy.

4. Jan has become the owner of the shares in dispute by acquisitive prescription.

5. There was a valid transfer of the shares, at least by tacit consent.

6. The heirs have forfeited their rights.

Which of these findings determined "the overriding issue"?

Obviously, neither finding 5 nor 6 was so regarded by the court itself, because the opinion states that they were superfluous.

An analysis of the opinion leads us to the conclusion that the basic holding of the court was that Jan had acquired good title to the shares there in dispute by acquisitive prescription. As we have said above, the court, after holding that the will and memorandum embodied a sales legacy, did not proceed to determine whether the property covered had been legally transferred to him. The court held that this question "is of no importance if Jan Bata's invocation of acquisitive prescription can be accepted".

The court then referred to the decision on sales legacy as establishing that Jan had a "legal claim" to all the shares of the companies. It found, as was admitted, that Jan Bata had had actual control of the shares in suit for more than three years. It emphasized the fact that the heirs had voluntarily transferred the shares to him, and that he had thereafter exercised the rights of owner. It rejected the heirs' contention that Jan held the shares as "Inhaber", *i.e.*, as nominee or agent.

It proceeded to apply the requirements of prescription set forth in ¶1460 of the Czech Code, which reads:

> "1460. In addition to the capacity of the person and the thing, prescription requires that there be actual possession by someone of the thing or the right that is to be acquired in this manner; that his

possession be lawful, in good faith, and true, and that it be continued during the entire time prescribed by law. (¶¶309, 316, 326, and 345).

It then held that Jan's possession was "rightful", because based on a legally valid title (sales legacy), "reasonable", because he considered himself as owner, and "real", because his possession was not based on fraud or violence.

It concluded, as above stated, that Jan in any case, "regardless of the manner in which he obtained the possession of the shares *** has since become the owner ***".

The Chancellor's comment on this holding is:

> "Clearly the Dutch court did not declare Jan to be the owner of the Dutch stock on the ground that the will created a sales legacy in his favor which he had accepted and which had been legally transferred to him. Rather, under its acquisitive prescription determination the court used its sales legacy determination as the basis for finding that Jan had a legal claim or title, a necessary element in determining that acquisitive prescription was present. However, Jan also had to prove rightful possession under that doctrine".

We agree. The finding of sales legacy was not the fundamental basis for upholding Jan's title. It was used to supply one of the three code requirements for lawful possession.

Applying the test of the language of the Supreme Court, we think it clear that sales legacy was not the all-governing question decided by the Court of Appeals; the fundamental finding was acquisitive prescription. Defendant's expert witness testified to the contrary; but we cannot accept this opinion. Why should sales legacy be

singled out as the "all dominant issue", since the court did not, in its treatment of the point find that the subject matter of the legacy, *i.e.*, the Bata "concern", had been transferred to him? . Defendant's expert admitted that the finding of acquisitive prescription was not a superfluous finding, but insisted it was not "the overriding issue". This reasoning we cannot follow. Under the test announced by the Supreme Court of the Netherlands, we think that the legacy point was not the "all-governing" issue in the Court of Appeal's decision. That issue was acquisitive prescription.

Support for this conclusion is found in subsequent proceedings in Holland.

The heirs appealed from the decision of the Court of Appeal to the Supreme Court of the Netherlands. Since only questions of Dutch law are considered by that court, its decision affirming the judgment is not significant here. However, under Dutch practice the Attorney General files his opinion. In that opinion he stated that the Court of Appeal had rejected the heirs' claim to ownership on three grounds: (1) prescription; (2) valid delivery; and (3) forfeiture and estoppel. The second and third findings, he said, were non-essential grounds. No mention was made of the finding of sales legacy. A reasonable inference is that the "all-governing question" was, in his opinion, acquisitive prescription.

There exists also for our guidance a decision of another Dutch court—the Restitution Court of the Council for the Restitution of Rights. This decision is dated August 12, 1959, and hence the Chancellor did not have the benefit of it.

The proceeding was brought by Leader, the Swiss Company, against the Dutch Company, Bata-Best, Jan Bata, and the Kingdom of the Netherlands. Its object was the nullification of the issue of an additional block of shares of Bata-Best issued in 1942 under the German occupation. The issue was claimed to have been made

under duress. Jan opposed the relief sought. He contended that the nullification of the shares would prejudice his position in Bata Best, because Leader would then control Bata Best; whereas he had been recognized in the Netherlands as the owner of the Bata concern "in its entirety." He invoked the legacy finding of the Court of Appeal, and argued "that the decisions implied in the reasoning of the judgment obtained the force of *res judicata*," although the formal issues concerned only 225 shares of Bata Best.

Leader argued that the Court of Appeal decided only that Jan had become owner of the 225 shares by acquisitive prescription; and further argued that, assuming that the Court of Appeal had decided that Thomas had intended to transfer all his assets, yet whether that intention had been carried out was investigated only with regard to the 225 shares, and that the Court of Appeal did not decide that any Leader shares were transferred or bequeathed to Jan. Leader also referred to the litigation then pending in Switzerland and in America with respect to the ownership of the majority block of Leader shares.

The Court found that the issue of the new shares in 1942 was effected under duress. The Court held that its sole concern was to rectify an improper situation that resulted from the war, and not to redress alleged wrongs having no concern with the war.

The Court, however, went on to say:

> "Whereas the Court wishes to point out, moreover, that the view taken by Jan Bata that he is entitled to all power in the Bata concern, and that this has been established within the jurisdiction of the Netherlands, appears incorrect, since such a far-reaching decision is not contained in the judgment of the Amsterdam Court of Appeal and, even if this were otherwise, it would not bind Leader; consequently,

since in Switzerland as well as in the United States of America, the struggle for the position of power in the Bata concern is still continuing between the interested parties, and since the Leader shares are also involved in this dispute, Leader has rightly stood up in the present case as an independent legal person for its own interests, * * *."

The above is a judicial utterance supporting our conclusion. True, it is what we would call dictum; but it is none the less persuasive.

Defendant invokes a decision of the Dutch Court of Appeal in which the prior decision on the sales legacy question is referred to as conclusively deciding that "Jan Bata was designated as the owner of the entire industrial property of Thomas Bata, Sr." This suit concerned the calling of a stockholders' meeting of Bata a.s., the Czech company. The heirs were not parties. The suit was brought by Cipera and Hynek Bata. Defendant says that they were in privity with the heirs, but there is no finding to that effect. No question of the Dutch law of *res judicata* was passed on. The Court's reference to the prior decision seems to have been by way of citation of authority (as we would put it), and not as a holding that the "overriding issue" was the same in the two cases. The case simply decided that Jan had the right to call a stockholders' meeting.

Another decision is also referred to, concerning a similar dispute. Jan brought a suit to compel the issuance to him of a proxy covering shares of Bata a.s. held by Marie's estate. The District Court made an order to that effect, and referred to the prior decision as designating Jan as the owner of the "entire industrial property" of Thomas. The decision was reversed on the ground that the application was premature.

Once again, we fail to find in this reference by the District Court to the prior decision of the Court of Appeal

any persuasive holding that the broad question of ownership was *res judicata* under Dutch law.

It is our conclusion that the decision of the Dutch Court of Appeal with respect to the question of sales legacy is not binding upon us in the case at bar. The suit before us is for ownership of Leader shares which were not before the Dutch Court. The Dutch Court was dealing only with the shares representing the minority interest of Bata Best originally registered in Thomas' name and delivered after the death of Thomas. Consequently, the "all-governing question" or "overriding issue" of acquisitive prescription relates only to those registered minority shares. These shares obviously stand in a different position from the bearer shares of Leader. Even if the Dutch judgment is entitled to collateral estoppel effect in a subsequent suit involving the ownership of registered minority shares of other companies of the Bata enterprise acquired by Jan under similar circumstances, it can have no collateral estoppel effect in a suit brought to obtain title to Leader shares which as will be seen stand in entirely different circumstances.

The Swiss Judgment.

Since it is admitted that the rule of collateral estoppel is not recognized in Switzerland, it is unnecessary to consider the Swiss decision at this stage of this opinion. It will be referred to hereafter.

Having concluded that neither the New York judgment nor the Netherlands judgment is binding upon us, we now turn to the merits.

The Merits.

The question for decision concerns the ownership of the 1170 shares of Leader now deposited in the Court of Chancery.

We start with the proposition that by virtue of the Czech Code and the estate proceedings Tom and Marie

as universal heirs, succeeded to Thomas' title to all his estate, including the Leader shares. This is not disputed. Tom asserts that nothing has occurred to divest the heirs of that title. Jan asserts three grounds upon which he claims ownership.

(1) The sales memorandum and will ("codicil") embody a sales legacy to him of the entire Bata enterprise.

(2) Even if this be not so, he has acquired good title to the Leader shares under the Czech legal doctrine of "constitutive recognition."

(3) In any event, he has acquired such title under the Czech doctrine of "tacit waiver."

Sales Legacy.

Jan's claim of sales legacy is based upon the sale memorandum and will found in Thomas' safe after his death. The circumstances surrounding the finding of these papers have been related. We now set forth the documents in full:

The Sale Memorandum, dated May ~~10, 1931~~:

Dr. A. Merkur
Vaněrka
Čipera
opened by J. A. Bata [first page]
In our presence on 7/12, 32
on 5/10 1931
Notary
Dr. Hugo Foerster

I, the undersigned Tomas Bata sell
to you J. A. Bata and you purchase
from me all shares of Bata akc. spol.
Zlin as well as all shares of the construction
company "Zlin" then all shares of the
company "Tisk" then participations in the
Labstat establishments.
Of foreign companies I sell to you
the following shares or participations:

Company, ~~Bata~~ Schuh Aktiengesellschaft
Zurich nominal value frc. 450,000.–

Bata Matschapai	Amsterdam	51,000 Hol. fl.
Bave "	"	20,000 Hol. fl.
Bata Cipele i koze	Zagreb	2100,000 Dinars
Bata	Krakov	100,000 Zl.
Bata	Bukarest	2000,000 Lei
Bata	Alexandria	2,250 £
Bata	Copenhagen	400,000 D. Kr
Bata	Strasbourg	600,000 Frc

[second page]

Bata	Stockholm	40,000. Kr
Bata Deutsche Schuhe A. G.	Berlin	110,000 Rm.
Bata	Vienna	20,000 S.
Bata Shoe & Leather	Lynn	15,000 $
Bata "	New York	400,000 $

I sell to you shares
Further also of domestic companies

Bapoz spol. s. r. o.		400,000 Kc
Paris akc. spol		500,000 Kc
Atlas insur.		3,000,000 Kc
Busi	Trebic	10,000,000 Kc
Budisovsky	Trebic	10,800,000 Kc

From these values ~~I exclude~~ is excluded the landed property Loucka a Lazy as well as my residential house in Zlin
Besides these enumerated values ~~included are in the sale~~ I sell to you all ~~an~~ my property even if it is not enumerated here for the amount of Kč 50,000,000 fifty million K.c. Czechoslovak currency.
You are under obligation to pay this purchase price in cash within one year from taking over the companies and to pay 5% interest pro ano
7/13,32 note:

From the sold property is further excluded the debt which we have against the city in the amount of approx. 4300,000 that is by such

I agree and purchase; (signed) J.A. Bata (signed) Tomas Bata that is to say, I agree and purchased as per oral agreement.

The will, dated May 19, 1931:

/

[first page]
S1 25/32

1

My last will:
Made on the day 19/5 1931
My property as of today
consists of

Claim against J. A. Bata of for all shares sold xx		
domestic and foreign comp.	Kc	50,000,000
My dwelling house in Zlin		100,000
Landed estates Loucka and Lazy and Schmergerle		3,000,000
Claim against the City of Zlin—About		4,300,000
		57,400,000
From this my property I bequeath		
To my wife Mrs. Marié Bata		
Landed estates Loucka Lazy Schmergerle—		3,100,000
Further in cash—	Kc	5,000,000
To my son Tom Bata his legal quota	Kc	22,000,000
with the provision that this his property shall be administered by his mother until he reaches 22 years of age. The proceeds shall be used for his education and the remainder shall be deposited for his benefit.		
		30,100,000

[second page]

Carried forward	30,100,000
To my sister Anna Schiebel I bequeath	1,500,000
To the City of Zlin the debt	4,300,000
with Bata a.s. J. A. Bata will pay	
The balance—	Kc 21,500,000
	57,400,000

I give to my fellow workers
is to be paid
~~is payable~~ within 5 years with 5% interest
This amount ~~is to be paid in cash~~
to the Bata Workers Benevolent Fund and is to be administered in the spirit of the now effective by-laws.

It is understood that I have drawn up this last will with full understanding being of sound mind and without duress and in my own handwriting.

/s/ Tomas Bata

My previous testament hereby naturally loses its validity.

/s/ Tomas Bata

Published at the District Court in Zlin
on the 13th day of July 1932.

[Seal of
the District Court
in Zlin]

/s/ Loucka Bohumil

Two questions at once arise: (1) What is the legal effect of these two documents under Czech law? (2) What did Thomas Bata intend to accomplish by them?

First, as to legal effect. It is admitted (as was held in New York) that the sale memorandum is not a valid contract of sale under Czech law. It never left Thomas' possession. Jan had never seen it. Jan's claim in the New York litigation was that there had been an *oral* contract of sale in Thomas' lifetime, but that contention has been conclusively resolved against him.

Jan's claim must therefore rest upon the will and sale memorandum, either or both. The two documents, it is said, evidence an intent to grant to Jan a *testamentary* right to purchase, *i. e.*, a sales legacy to take effect after death. Conceding that the *inter vivos* sale was a fiction, adopted for the dual purpose of preventing disclosure of the real estate and of avoiding taxes, Jan argues that there is nothing inconsistent between the accomplishing of these purposes and the legacy to him.

The insuperable difficulty with this argument is that there is nothing in the will to support the idea of any legacy to Jan. The will is clear enough; it simply disposes of a supposed estate of 50,000,000 crowns represented by a debt of Jan Bata to Thomas.

The Czech law of will construction does not seem to differ greatly from our own. Code Section 582 provides:

> "A disposition of the testator made by reference to a note or writing, is effective only if such writing complies with all the requirements necessary for a valid last-will declaration. Otherwise, such written remarks indicated by the testator may be used only for the interpretation of his intent".

Clearly the sale memorandum cannot be construed as a will, if for no other reason than the fact that the other document was clearly intended to be the will. May the memorandum be used to interpret Thomas' will so as to read into the will a sales legacy?

The Chancellor held not; and we agree with him. Many decisions of the Austrian and Czech courts were cited to him, as well as the writings of legal commentators. These authorities are all carefully considered and analyzed in the Chancellor's opinion. They all support, in one way or another, the rule that "the interpretation of a testament must have some, however slight, support in the testament and must not be totally contradictory to the clearly expressed intent of the testator". (Austrian Supreme Court decision, July 18, 1952.)

In the instant case there is not the slightest hint in Thomas' will of any intent to bequeath anything to Jan. The will is predicated upon a supposed claim against Jan, arising out of a fictitious sale. As the New York Court of Appeals said, the will disposed of a non-existing asset.

It is unnecessary to analyze the applicable Austrian and Czech decisions. All of them have been read. Many of them concern the question whether a statement or a writing, somewhat ambiguous, was intended to have testamentary effect. Thus, in one case, the deceased left a will in which he provided: "The statutory right of succession of my wife, who is separated from me, is untouched". This statement, supported by extrinsic evidence, was construed as a bequest.

Here we have nothing to construe.

Jan's counsel argues that what Thomas did here was to leave "a disguised legacy". The cases indicate that the Czech courts will give effect to such a legacy, but, again, before that can be done some testamentary provision, or some utterance or document intended to have testamentary effect, must afford the "hint" or "clue" to the testator's intention. The "supplementary interpretation may take place, only then, 'when the declaration itself offers some basis for supplementing the declaration'." Klang-Handl, *Commentary to the General Civil Code* (A.B.G.B.).

We can add nothing further to the Chancellor's discussion of the applicable Czech law.

Mention should be made, however, of the holdings of the Dutch Court of Appeal and of the Swiss Superior Court on this question. The reasoning of the Dutch Court is not, we think, persuasive. Although the court cites §582 of the Code, it does not attempt to examine the Czech decisional law construing this section. Hence the requirement of Czech law that some hint of intention to create the legacy must be found in the will itself is ignored. We are inclined to think, as the Chancellor did, that the court's basic finding—that it was Thomas' intention to leave all of his shares of stock to Jan—colored the whole opinion. As we shall see, this finding of underlying intent rests on very dubious grounds.

Moreover, the court stated flatly—ignoring the uncontradicted evidence in the New York case—that there was no reason to suppose that the value of Thomas' estate differed much from the value assessed by the tax authorities—$8,000,000. Also, the Court of Appeal took the view that to attribute to Thomas Bata an intent to evade taxes was "a grave misjudgment" of his personality. This view we cannot help regarding as somewhat naive.

The Swiss Superior Court reached the opposite conclusion. Jan (apparently as an afterthought) asserted the existence of a sales legacy. The court said that the sales memorandum could not constitute a valid testamentary disposition, and also held that the will setting out the claim against Jan could not cure this defect since "the testator in no manner expressed the intent of, or even hinted that he was thinking of, a legacy ****". Thus the Swiss court applied what we have found to be the Czech rule of interpretation of wills by reference to extraneous documents.

We must, however, carefully analyze Jan's argument to the contrary.

Accepting the rule that some hint of the claimed legacy, however, slight, must be found in the May 1931 documents,

he argues (1) that the hint may be found in *either* document, and (2) alternatively, that the two documents may be treated as one and, read together, evidence an intent to create a testamentary bequest to Jan of all of Thomas' shares upon Thomas' death. Under either approach to the problem, he says, the documents should be read in the light of Thomas' background and his philosophy of social responsibility, which tend to show that he intended Jan to succeed to absolute ownership and power in the Bata enterprise.

We have had some difficulty in following the development of this argument, and we note that the Chancellor had the same difficulty. What counsel seem to be saying is that any one of three constructions of these documents supplies the necessary hint of Thomas' intent, and the extrinsic evidence of Thomas' philosophy supplies the reason for the intended bequest.

The very multiplication of possible constructions of the papers emphasizes the difficulty of finding any hint of a sales legacy in either of them and the weakness of defendant's argument on the point.

First, as to the sale memorandum. How can this meet the requirement of the "hint" rule? The Czech rule, as we have seen, is that the hint must be found in the will. We repeat that this is not a case in which it is possible to construe the memorandum as a will, because the other document is beyond doubt intended as the will. Moreover, counsel concedes, as we read the briefs, that the memorandum is drafted to avoid any suggestion in any of its words that the disposition to Jan was for the event of death. This is clearly the case; therefore the sales memorandum cannot meet the "hint" requirement of Czech law.

Second, as to the will. It is clear to us, as it was to the Chancellor, that the will contains no suggestion of a legacy to Jan or any provision for his benefit. Again, counsel concede that the will is carefully drawn to avoid words suggesting any testamentary disposition to Jan. Naturally, it was

so drawn, since to have left a legacy to Jan would have defeated Thomas' purposes—secrecy and tax evasion.

Jan's alternative contention—that the two documents may be treated as one—has some surface appeal. It is buttressed by the further argument that the extrinsic evidence—the "Moral Testament"—shows that Thomas intended Jan to succeed to ownership and power.

But it will not bear analysis. Reduced to its simplest terms, it is an argument that the memorandum must be read as a part of the will. In effect, this is the view taken by the Dutch Court of Appeal. We have already considered it. It runs afoul at once of the Czech Code (¶582, quoted above) and of the Czech decisions. No argument based on extrinsic evidence can avail to expand the language of the will to include a reference to the sales memorandum as a part of the will.

Moreover, the extrinsic evidence of Thomas' intent that Jan should succeed to both absolute ownership and power falls considerably short of being convincing. It is based on certain writings of Thomas, one the so-called "Moral Testament" and another an article published in a newspaper in 1927, entitled "My Attitude Towards Work".

The "Moral Testament" is headed: "To Accompany My Last Will". As above stated, it was found in the safe in May, 1932, after Thomas' death. It develops the idea that the Bata factory had not been built simply for the benefit of the founders and owners; that it had a higher purpose in furthering the general well-being of the community, both workers and customers. It concludes:

> "So long as you will serve this great idea, so far you will live in accordance with the laws of nature and of man. So long will you be useful to all and so long will you be unconquerable. However, as soon as you will think only of yourselves, as soon as you cease to serve with your factory the commonwealth,

you will become superfluous and you will fall inevitably".

We are told that it was written in 1908. At that time Thomas had not been married and Jan was ten years old.

However praiseworthy its philosophy may be, the "Moral Testament" certainly does not contain anything pointing specifically to any successor. The "testament" must have been addressed to *any* future owner or owners of the business.

The 1927 article sets forth Thomas' attitude toward work. It concludes:

> "My work has only one purpose: the service to life. I admire life. I love life. I wish to live through it ten times in sequence without a change, or under any conditions. I wanted to have 10 sons; not so that I will be able to divide my fortune among them, but to teach them how to live and work.
>
> Now I have thousands of sons, if only one who bears my name. *I shall leave my fiddle to the best of them all;* but so that he may play for others and not for himself.
>
> My son has not even the prospect like many a son of poor parents—to become gentlemen. He will not study in a college, the less in a university. After having finished the high school, he will become a free thinking craftsman like his father is.
>
> He will have just as much property as he will earn himself. He will anyhow have large advantage over the others, because he will have at his side more experienced advisers and certainly I shall not forget to draw his attention to the suitable opportunities". (Emphasis supplied.)

The "fiddle" metaphor derived from a prior reference to his property as similar to the violin of a musician. Counsel argues that this utterance, read in the light of

the "Moral Testament", forecast the choice of Jan as "the best of them all".

There are several difficulties with this argument.

First, in 1927 a will written by Thomas in 1918 was in effect. It made substantial provisions for his widow and for his son, then five years of age, as well as for Jan Bata. During Tom's minority control was to be separated from ownership, but after Tom should become of age working control would revert to him. It is hard to reconcile the existence of this will with counsel's construction of the 1927 article.

Second, Jan in 1927 was not even employed in the Bata business, having left it temporarily for about a year because of his desire to build his own home rather than live on company-owned property.

There are other considerations strongly rebutting the inference that Thomas intended by the May 1931 papers to vest absolute title and control in Jan.

There is the inherent improbability in imputing to Thomas an intent to cut off his widow and son with a very small fraction—about one-thirtieth—of his estate; and the further improbability of cutting off his son, whom he was grooming for leadership, from any assurance of control of the enterprise.

There is the admitted fact that the whole scheme of an *inter vivos* sale was a fiction designed to conceal the assets of the estate and to avoid crippling inheritance taxes. It was so found in New York. The Appellate Division said:

> "The so-called agreement of sales dated May 10, 1931, and the will of Thomas Bata dated May 19, 1931, appear to have been designed chiefly, as Mr. Justice Schreiber has said, for tax purposes". 279 App. Div. 182.

Counsel for Jan argue that this fiction is not inconsistent with an intent to leave the whole property to Jan.

but we do not agree. The price fixed for the "sale" was at the most one-twentieth of the real value of the property.

Again, as heretofore noted, payment of the debt of Thomas Bata to Bata a.s. of 35,000,000 crowns—over a million dollars—would have wiped out the bequests to the widow and son. This circumstance suggests that the provisions of the documents were not intended to be followed literally. The same inference can be drawn from Thomas' treatment of the real estate. He did not even explicitly devise his residence to his widow; and after making the will he transferred to Bata a.s. other real estate that he had devised to her.

What, then, it may be asked, did Thomas Bata really intend or expect when he drew up the two documents in May, 1931?

This is the second question that we posed at the outset of the discussion of the merits.

Any answer is in the realm of speculation. It may be that Jan was intended to be a mere nominee or agent of all the property—on the theory that his relationship to the heirs would be "flavored with a trust", as the Chancellor put it.

Or it may be that Thomas intended Jan to have the full title to all the property, but, "in the expectation that Jan would treat it as a mere simulacrum and do what was right" as regards Tom and Marie. Per Van Voorhis, J., 279 App. Div. 182.

Again, it may be that the transaction was incomplete, *i. e.*, that Thomas intended at some time to supplement the 1931 documents by a later will or by a private memorandum to his family, and that his unexpected death prevented him from so doing. Some slight support for this possibility is found in the following incident.

In December, 1931, while traveling by airplane to India, Thomas wrote a note book or series of entries and comments. Among them is a reference to a recurrence of

an old ailment—thrombosis—and the writing of another will en route. Later he records the fact that his leg stopped hurting and adds: "I tore up the last will". Perhaps it is inferable that the 1931 documents were not complete.

There is another possibility not mentioned by any of the courts that have reviewed this puzzling set of facts. It may be that Thomas intended—or hoped for—some sort of division of the enterprise—the Leader shares and ultimate control to his wife and son—Bata a.s. and the minority shares, registered in Thomas' name, to Jan with active control of the entire enterprise to be in Jan until, at least, such time as Tom was able to accept the responsibility. Such an intention on the part of Thomas would have been consistent with his business philosophy.

This theory finds some support from the fact that, by his 1918 will, Thomas left Jan a substantial interest in the enterprise—1,000,000 crowns—or roughly one-tenth of the value of the enterprise as it then existed. Also, by his 1918 will, Thomas left ultimate control of the entire enterprise to his son, Tom, but provided that that control should be deferred until a future date.

Further support for this theory is found in the fact that the Leader shares are not mentioned as such in the papers—it is only from the use of the word "majetek" (all my property) that Jan is able to build an argument that he acquired them. The papers list only stockholdings which, since they were registered in Thomas' name and had been reported to the Czech authorities, obviously could not be concealed for tax evasion purposes. Each of these listed stockholdings was assigned a value (possibly the par value). The exception was Bata a.s. which had never issued any stock in Thomas' lifetime but which, nevertheless, was known to Czech authorities as the property of Thomas.

Under this assumption, therefore, Thomas' intention was carried out, viz., concealment from the Czech tax au-

thorities of the value represented by the Leader shares and sixty percent of the value of the foreign companies. His intention, also, of control of the enterprise, at least until Tom could take over, was assured.

Finally, if may be that Thomas intended the documents as an outright bequest to Jan of the entire Bata enterprise, without any reservation or expectation whatever.

We have suggested a number of possible answers to the question, What was Thomas' intent? There are obvious objections to each of these answers. We have suggested them solely to emphasize the uncertainty surrounding the matter, and the unsoundness of attempting to build up from extrinsic evidence a supposed intent and then to construe the documents in the light of that intent. This, we say with respect, is in our opinion the fundamental error into which the Dutch Court of Appeal fell. Any conclusion founded on such a basis is not to be trusted. It is impossible to be sure what was Thomas Bata's actual intention.

We fall back, therefore, as the Chancellor did, on the principles of the Czech law of will construction. The Chancellor said:

> "As I find the Czech law and without regard to the testator's actual intentions, it must be concluded that Thomas Bata did not by his May 1931 will create a sales legacy in favor of Jan". 139 A.2d 195.

In other words, even if Thomas Bata actually intended to create a sales legacy in favor of Jan, he did not take the necessary legal steps to accomplish it.

We are in accord with the Chancellor's conclusion.

Constitutive Recognition.

This doctrine of Czech law is the basis for Jan's second claim of title. It is a rule judicially evolved. The Czech Supreme Court has defined it thus:

"A contract whereby without mutual concession by the parties a legal relationship is determined. • • • The agreement • • • is not a mere admission of a fact, but is in the nature of a disposition concerning a legal relationship in the same way as a compromise". Decision of Czech Supreme Court, August 23, 1928.

In that case it appeared that the parties had engaged in certain business transactions. Plaintiff had asserted a claim and defendant disputed it. Later defendant acknowledged the debt. This acknowledgment was held to be a valid recognition.

The doctrine may perhaps be analogized to our rule of compromise and settlement, except that in Czech law no consideration is required. The prior legal relationship supplies the "*causa*", or prior obligation or claim which is the basis of the recognition. Cf. Decision of Czech Supreme Court, March 9, 1928.

This rule "is based on the principle of freedom of contract", and "creates a new cause of action". Decision of Austrian Supreme Court, May 14, 1918. It is an independent source of obligation. Decision of Austrian Supreme Court, January 9, 1923.

The person sought to be held must have "intended to commit himself anew", and this is a question of fact. Decision of Austrian Supreme Court, Sept. 5, 1930.

There must be some dispute or uncertainty which is resolved by the recognition. Decision of Austrian Supreme Court, March 27, 1930.

The definition given by Jan's expert witness is as follows:

"Where the recognizing party, the recognizing person is connected with the other party by a past factual basis, by a series of facts which amount to an incomplete, doubtful, disputed, or unenforceable obligation; recognition makes this relation perfect, final, definitive, and enforceable".

His opinion that the doctrine applies to this case was apparently based on a supposed ambiguity in Thomas' will. Asked what was the past factual basis, he testified:

> "A. The connection created by a last will declaration. What I assume is that no sales legacy was expressed in the documents of May 10 and May 19. The last will, the expression of last will wish, the expression of a last will disposition which was not clear, and *wherever heirs remove a lack of clarity with regard to a legacy by recognizing or fulfilling the legacy* in spite of the ambiguous expression, there the doctrine of constitutive recognition works". (Emphasis supplied.)

This opinion seems to lead us back to the main question: Is there something in the words of the will indicating a legacy? We have already answered it in the negative.

Jan's claim is (in effect) that the conduct of the heirs evidenced a recognition of the legacy. We note that in most of the Czech cases there is proof of an express contract of recognition. Of course, nothing of the sort exists in this case, that is, an express contract between Jan of the one part and Tom and Marie of the other part. Jan relies, as he must, upon a tacit recognition growing out of the conduct of the heirs in settling the estate and carrying out the supposed inter vivos sale.

The recognition may be tacit, but "a tacit declaration of intent can be assumed only if the facts, with consideration of all circumstances, do not leave any ground for a reasonable doubt as to the intent of the party". Decision of Austrian Supreme Court, October 21, 1891.

The conduct of the heirs relied upon as evidence of "tacit recognition" of Jan's title is, of course, in the first place, the series of acts taken after Thomas' death to carry out the fiction of the *inter vivos* sale. The most important of these are: the acceptance of Jan as "the Chief"; the transfer of the minority shares to Jan; the acceptance of the book credits; [illegible]yment of legacies and

inheritance taxes; and the declaration in lieu of oath in the estate proceedings. In the second place, much is made of the long lapse of time during which the heirs failed to challenge Jan's position—during which, Jan argues, they recognized him not only as the Chief but also as the owner.

The answer to the first point is plain. The acts and declarations of the heirs in settling the estate, whether considered singly or as a whole, were not taken or made as a compromise or disposition of any disputed claim, or with any intent on the part of either Tom or Marie to create a new cause of action or to commit themselves anew. There was no dispute or questioned claim whatever—certainly no evidence that the heirs were conscious of any. These acts and declarations were done and made *alio intuitu*, for a purpose wholly different—the carrying out of the fiction of the inter vivos sale. Because of the grave need for concealment, and the need to evade crippling taxation, it was to the interest of all the parties to work together to set up a fictitious screen behind which the Bata business could continue to function as it did during Thomas' lifetime. It is a fair inference that the parties were indifferent to legal concepts in carrying out their main purpose. Certainly it was sufficient for Marie to know that Thomas Bata "wanted to have it like that"; and one cannot imagine that Tom, a youth barely eighteen, had any different thought about the matter. Jan and Cipera, we may be sure, fully understood the need to carry out the fiction.

It cannot reasonably be said that the conduct of the heirs evidenced any recognition of any sales legacy to Jan. Indeed, no one ever thought of sales legacy until years later, after the trial in the New York Supreme Court.

As to the second point, it is quite true that for years no question of ownership was raised by the heirs. Nor was it clearly raised by Jan. The truth of the matter seems to be that the primary motive with everyone was to carry on the Bata enterprise in the tradition of Thomas Bata. The taxing authorities had obligingly accepted the fiction of a sale.

and thereafter it was not to be expected that the heirs would have "rocked the boat", as the Chancellor put it.

Finally, none of these alleged acts of recognition of Jan's legal and beneficial ownership of the minority shares has any application to the Leader shares. These are the shares in dispute. None of the Leader shares was ever assigned or delivered to Jan. As we shall see, in discussing the next question in the case, he never had possession of any of them.

One incidental argument, however, should be noticed. Jan seeks to make some point of the method of handling the Leader profits. During Thomas' lifetime, Thomas took no credit for profits on Leader's books, although his associates had such credits. Jan had participated in the profits of certain departments, but received no participation after Thomas' death. This, he says, is evidence that he succeeded Thomas as owner. This failure to receive further participation was, according to Cipera's testimony in the New York suit, attributable to his own inaction.

An argument is also made that Jan, as owner of Leader, personally guaranteed the payment of Cipera's credits on Leader's books. The evidence does not warrant this conclusion. It only shows that Cipera was advised by Jan that Cipera's credits would be paid to him on request.

We think that the evidence fails to show any intention on the part of any of the three parties to enter into any recognition contract after the death of Thomas. Certainly, as the Chancellor said, the evidence leaves room for a reasonable doubt.

We agree with the Chancellor's holding on this question.

Tacit Waiver.

Under Czech law tacit waiver is the "continuing failure to exercise a right where, considering the circumstances

of the particular case, the other party was justified in relying on the assumption that the transaction had been finally wound up". Klang-Gschnitzer, *Commentary to the General Civil Code.*

Tacit waiver is solely a matter of defense: it is available only to a person in possession.

The Chancellor found, on evidence clearly justifying his finding, that Jan never had possession of the Leader shares in suit.

We affirm his finding. We have not overlooked counsel's long and ingenious argument built upon the circumstance that Moska for some period had a safe deposit box in London in the joint names of himself and Jan. It is claimed that the Leader shares were deposited in this box for the account of Jan. We find the contention quite unconvincing.

We can add nothing to the Chancellor's opinion on this point, which, to the extent that it deals with the matter of possession of the Leader shares, is hereby adopted as the opinion of this Court.

The above conclusions dispose of Jan's three contentions with respect to the shares in suit.

However, before concluding the discussion of this case, we must make quite clear the basis of our decision that the Leader shares in suit are the property of the plaintiffs. We hold (1) that title to these shares vested in the heirs by the deed of delivery of the Czech court, and (2) that Jan has not succeeded in divesting the heirs of that title on any of the grounds urged in this case.

We decide nothing with respect to the ownership of the minority shares, concerning which much is said on the briefs. The New York courts, in awarding certain Leader shares to Tom and Marie, were careful to make the same distinction. Referring to the transfer to Jan of certain minority shares, as well as the agreements relating to the shares of Bata a.s., the Court of Appeals said:

"The status of these securities, however, must be evaluated in their own setting". 306 N.Y. 96.

Moreover, it is not necessary for the present decision to decide the difficult question of Jan Bata's status with respect to the heirs during the years when he was administering the Bata enterprise. Was he a sort of agent or trustee? Certainly, as the Chancellor said, no specific agency or trust was ever proved. Or was he acting primarily for himself under claim of right adverse to the heirs? Or was he merely with the consent of all "the Chief" and the owner of an interest in the enterprise? The answers to these questions are important in dealing with the minority shares, but for the present decision they are not required.

We realize, as the Chancellor said (in his opinion on Jan's claim for compensation), that there is an implication in his main opinion that Jan owed a fiduciary duty to the heirs akin to that owed by a trustee or confidential agent. But that holding is not necessary to sustain his finding of title to the Leader shares. Accordingly, it is unnecessary for us to review it, and it is neither affirmed nor reversed.

It follows that the Chancellor's decision on the merits must be affirmed.

Compensation to Jan Bata.

After the Chancellor had filed his opinion upon the merits, a hearing was held on the form of the final decree. It developed that Jan Bata asserted a right to establish an interest in or lien upon the Leader shares arising out of his services, or the services of his counsel with respect to such property.

Pursuant to the Chancellor's order, Jan on June 9, 1958, filed his claim. It recited the fact that after Thomas' death Jan, with the consent of the plaintiffs, had administered the business. It averred:

"Accepting, arguendo, for the purposes of this application, the determination herein made that defendant was not owner, defendant administered the enterprise above stated *as its trustee*". (Emphasis supplied.)

Jan prayed for an order awarding compensation for his services in respect of the property in suit as a condition to delivery of the property to the plaintiffs.

The right to compensation was challenged by the plaintiffs. The Chancellor, after a careful review of the matter, determined that Jan was entitled to compensation for his services to the enterprise. This holding was predicated, like Jan's claim, upon the finding or assumption that Jan was a trustee or confidential agent, who had rendered the heirs outstanding services by the successful administration of the Bata enterprise.

However, the Chancellor conditioned the granting of leave to file the claim upon Jan's depositing with the Court his minority shares. The Chancellor said:

"I believe that the granting of permission to defendant to file his claim should be so conditioned that defendant will not possibly receive a duplicate benefit or, by retaining the property, maintain a position which is incompatible with his claim for compensation".

Jan, however, declined to deposit the shares, and on September 15, 1958, the Chancellor dismissed his claim.

We think that the claim was rightly dismissed, but we think that the dismissal should have been without prejudice for the following reasons:

The claim was predicated, as we have shown, upon the assumption that Jan's control of the enterprise, and his holding and control of the minority shares, were those of a quasi-trustee. The Chancellor's requirement for de-

posit of the minority shares was clearly predicated on the same assumption. But this is only an assumption. It is not to be regarded as settled notwithstanding the implication to that effect in the Chancellor's opinion in this case. Until it is settled, the right to compensation is not established.

Jan now claims to own the minority shares outright. He is entitled to litigate that claim. It is, of course, possible that he may establish it. If, after litigation, Jan emerges (for illustration) as a forty per cent owner of the whole enterprise, it might well be argued that he would be entitled to no compensation—or at least to an amount much smaller than that to which he would be entitled if had no interest in the Bata enterprise. Even if compensation is allowable in the latter case, is it a matter for the Court of Chancery, or simply a claim at law against the Bata corporations or Leader?

Again, Jan might make good his claim as to some shares and fail as to others, because different results might be obtained in different jurisdictions.

We express no opinion upon any of these questions. We deal only with the timeliness of the claim. Since Jan was unwilling voluntarily to surrender all his minority shares (except the Dutch shares), and since the ownership of those shares is not settled, we think his claim should have been dismissed without prejudice as premature. This leaves Jan free to make, in any future litigation, any contention he sees fit with respect to these minority shares, or with respect to his right to compensation.

One other point should be dealt with. The Chancellor required that Jan deposit the minority shares *before* the appeal was taken. It was urged below, and urged here, that it would have been sufficient to require the deposit *after* the decision in this Court (assuming an affirmance). This was obviously a matter within the Chancellor's discretion, and we decline to review his determination.

Allowance of Counsel Fees.

Jan also filed a claim for counsel fees. This claim was disallowed. The Chancellor, citing *Maurer* v. *International Re-Insurance Co.*, 33 Del. Ch. 456, 95 A.2d 827, held that the application did not fall within any recognized exception to the general rule that a litigant must pay his own counsel fees. He analyzed the nature of the case and the proceedings before him and reached his conclusion upon reasoning that we think is entirely sound. Counsel argue here that he applied the law (the rule of the Maurer case) too rigidly, but we do not think so. It is unnecessary to discuss the matter further. We affirm his dismissal of the claim for counsel fees.

Conclusion.

An explanatory word must be said about this opinion. It has not been possible, without expanding it to intolerable length, to deal with all the subsidiary points and arguments contained in the 1600 pages of briefs. Much is said (particularly by plaintiffs) about conflicts in the testimony and the credibility of witnesses. We have passed all this over, as the Chancellor did, in the interest of seeking to follow what we think to be applicable rules of law.

There is a great volume of evidence respecting the conduct of the parties during the war years, on which the briefs build many charges and counter-charges. The Chancellor's comment on this is very apt. He said:

> "• • • much of the evidence of happenings during the war years confuses rather than assists in reaching the basic issue. It represents actions taken for a purpose (to avoid seizure as enemy property) which is not necessarily related to the dispute here". 139 A.2d 204.

The facts concerning the formation of Westhold and North River, the two Delaware holding companies, the

peripatetics of the Leader certificates, the alleged conspiracy to secure control, and much other detail concerning the years just preceding the outbreak of litigation—all have seemed to us to have little relation to the main questions. We have not overlooked these matters, but we see no purpose in discussing them.

For the reasons stated in this opinion the final decree of the Chancellor of September 26, 1958, and the order of September 15, 1958, concerning claims, are affirmed; subject to the modifications necessary to conform such decree and order to that part of this opinion dealing with Jan Bata's claim for compensation; and the cause is hereby remanded to the Court of Chancery for New Castle County for the purpose of entering such modifications.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAN A. BATA,

Defendant Below, Appellant,

v.

THOMAS J. BATA; THOMAS J. BATA and DAVID GRAHAM, as Executors of the Estate of Mary T. Bata; and WESTERN INVESTMENT AND TRADING COMPANY, LIMITED, a Bermuda corporation,

Plaintiffs Below, Appellees.

No. 48, 1958.

(April 25, 1961)

SOUTHERLAND, *C. J.*, and WOLCOTT and BRAMHALL, *JJ.*, sitting.

Petition for reargument and to remand the case to the Court of Chancery to reopen the case to receive newly discovered evidence.

George T. Coulson of Morris, Nichols, Arsht & Tunnell, of Wilmington, Harold E. Stassen of Stassen; Kephart, Sarkis & Scullin, of Philadelphia, and Amos J. Peaslee, Jr. of Peaslee, Brigham, Albrecht & McMahon, of New York City, for appellant.

Robert H. Richards, Jr. of Richards, Layton and Finger, of Wilmington, and Inzer B. Wyatt, John W. Dickey and Edward C. Stebbins, Jr. of Sullivan and Cromwell, of New York City, for appellees.

SOUTHERLAND, *C.J.*:

The defendant-appellant, Jan Bata, has filed a petition for reargument on seven grounds. The seventh ground embodies a motion to remand the case to the court below in order that the defendant may move the Chancellor to reopen the case and receive newly discovered evidence.

Since the motion to remand presents a question not heretofore raised in this proceeding, we consider it first.

Petition to Remand

The petition advances a new theory of the case, radically different from the issues made by the parties, tried below, and reviewed here. Those issues were as follows:

1. Whether the sale memorandum of May 10, 1931, and the will of May 19, 1931, considered either separately or together, creates a sales legacy in favor of Jan Bata.

2. Whether the Czech doctrine of constitutive recognition is effective to vest title to the Leader shares in Jan.

3. Whether the Czech doctrine of tacit waiver is effective to vest such title in Jan.

Both in the court below and in this Court these issues have been resolved against Jan on the present record. See *Bata* v. *Hill*, Del.Ch. , 139 A.2d 159; *Bata* v. *Bata*, Del.Ch. , 163 A.2d 493.

In dealing with these questions it was agreed by all parties that the property in dispute, under Czech law, "passed to plaintiffs [Tom and Marie] as the intestate heirs subject to debts and legacies". Appellant's Brief, p. 8.

The new theory of the case on alleged newly discovered evidence is that the May 10th document was a valid offer of a contract effectively accepted after Thomas' death, and that title to the property in dispute—the Leader shares—passed directly to Jan and never vested in the heirs.

We quote from the petition:

> "The newly discovered evidence is as follows:
>
> It was the law in Czechoslovakia in 1931, 1932, 1933 and until 1938, that a unilateral declaration of sale addressed to an intended purchaser holographic and signed by the declarer and placed in a position where

it would be received by the intended purchaser after the death of the seller was a valid offer.

It was further the law in Czechoslovakia in 1931, 1932, 1933 and until 1938 that an offer did not terminate upon the death of the offeror unless the offeror had expressed a contrary intention, or such intent was to be inferred from the circumstances. Such an offer could be accepted validly within a reasonable time after death.

It was further the law in Czechoslovakia in 1931, 1932, 1933 and until 1938 that when such an offer was accepted after death, the probate court had the jurisdiction and duty to supervise the fulfillment of the contract and to supervise and confirm the provision of the substitute estate or payments for distribution through the deed of delivery. The title to the property sold passed directly to the purchaser and did not vest in the other heirs.

It was the law in Czechoslovakia in 1931, 1932, 1933 and until 1938 that the May 10th and May 19th documents in the instant case, upon the acceptance of the May 10th document by Jan A. Bata, did constitute a valid contract consummated after the death of Thomas Bata."

The petition is supported by affidavits of six experts in Czech law. Taken at their face value, these affidavits confirm the existence in Czechoslovakia, or at least in Bohemia and Moravia, of the rules of law set forth in the petition.

These affidavits also set forth the following:

These rules constituted a unique feature of Moravian and Bohemian law and a departure or variant from the rules of the Civil Law prevailing in Germany and other areas of Austria-Hungary. They had their origin in a Bohemian and Moravian tradition that peasant farms

should descend to a single owner, in order that the farm might not be split up into uneconomic units. This custom, deeply rooted, developed into the rules of law above quoted. A common and accepted method of insuring the transfer from an owner to his successor was the use of such a sales contract as the May 10th document, *i.e.*, an owner's declaration of sale delivered to and accepted by the offeree after the death of the offeror. This was a special method of giving effect to an owner's wishes, standing between an *inter vivos* contract and a testamentary sales legacy.

This practice was not limited to peasant farms. It was frequently applied in commercial and industrial circles where the owner wished to preserve economic unity.

Therefore, in the opinion of the experts, the May 10th document constituted a valid offer under Czech law, and Jan's acceptance completed a binding contract of sale.

The experts are also of the opinion that the Probate Court at Zlin duly supervised the performance of this contract, and that thereby the property of Thomas listed in the May 10th document became vested in Jan. The deed of delivery of June 28, 1933, vested in the heirs only the remaining property of Thomas Bata, and hence did not give the heirs title to the Leader shares.

The petition thus presents a theory of the case completely new to this proceeding. We shall refer to it as "the tacit-offer" theory, recognizing the inadequacy of this label to express the concept of Czech law.

The petition and affidavits also aver that this evidence of Czech law has never been presented in any of the courts in which this dispute has been litigated, because unknown to Jan and his counsel. In explanation or excuse for such lack of knowledge, the petition avers:

> "6. Nor is this surprising, nor is it evidence of neglect, since in the first instance the law and tradition and custom is unique to the area, and the area

has been closed throughout the years of this litigation as a result of the Communist takeover in Czechoslovakia. This law and custom and tradition does not apply with the same force throughout Austria, Germany, Switzerland and France. The Civil Law is usually looked upon as a unified whole, and thus this regional variant, grounded in local tradition and custom, was not ascertained previously.

"7. Furthermore, Defendant-Appellant Jan A. Bata was himself a generation removed from the peasant side, had no training in the law, had become deeply engrossed in the Bata shoemaking business at a very early age, and has been completely cut off from Czechoslovakian lawyers and from any opportunity to visit Czechoslovakia since this litigation arose. Unlike his much older brother Thomas, who spanned the transition from Moravian peasant farm owner and shoemaker to industrial urbanite, Jan began as an urban industrial employee and spent much of his youth in the United States. His limited means in the face of the multiplicity of legal attacks, and his remote location in Brazil have combined to make it understandable and excusable that he had not previously obtained this evidence of Czechoslovakian law and custom and tradition."

The plaintiffs oppose the granting of the petition on the following grounds:

1. That the theory of the case now advanced is not newly discovered, but on the contrary was developed and rejected in the prior law suits; and with reasonable diligence Jan could have obtained expert testimony in time to present it to the court below in this case.

2. That the Czech Probate Court in this case did not supervise the performance of a contract consummated after Thomas' death, but on the contrary dealt only with a supposed and fictitious *inter vivos* sale.

3. That the new theory requires a rejection of an express admission by Jan's former counsel in this case that title to the Leader shares passed to Tom and Marie as intestate heirs, and hence a new trial of the entire case.

4. That the present claim of the tacit-offer theory is *res judicata* by reason of the findings in the New York law suit.

Reasons 2, 3, and 4 we find it unnecessary to consider. We think that the first ground of opposition is well-taken.

To succeed upon a petition such as this the applicant must show, among other things, that the newly discovered evidence has come to his knowledge since the trial, and that it could not, in the exercise of reasonable diligence, have been discovered for use at the trial. *In re Missouri-Kansus Pipe Line Co.*, 23 Del.Ch. 215, 2 A.2d 273.

The proffered evidence, consisting of opinions upon rules of Czech law, is advanced in support of the tacit-offer theory, *i.e.*, that the May 10th sale memorandum embodied an offer, and, though it was not communicated to Jan, its validity was unimpaired by Thomas' death, and Jan's acceptance converted it into a valid contract of sale. This theory, although new to this case, is not new to the Bata litigation. It was developed in the prior law suits.

In the trial court in New York Jan's then counsel did not advance it, but in rebuttal the heirs' expert testified that the document was invalid under Czech law as an offer because not communicated. The trial court so found. 99 NYS 2d 535. On appeal, however, new counsel for Jan made the same argument as Jan now makes before us, *i.e.*, he advanced the tacit-offer theory. It was further developed at length in his reply brief. The Appellate Division, however, affirmed Justice Schreiber's findings concerning Czech law and "the absence of any enforcible oral or written contract." 279 App. Div. 182.

The argument was reiterated in the brief for Jan in the Court of Appeals. That Court affirmed, saying: "Both Courts have found that neither the May 10th writing nor the will constituted a valid enforcible contract under Czech law." 306 NY 96.

In the litigation in Holland, the same argument was developed at length before the District Court and again pressed in the Court of Appeal. In the Swiss litigation it was again advanced.

Enough has been said to show conclusively that the theory of the case now advanced as ground for reopening it is not newly discovered. It was known to Jan's counsel for years before the institution of the Delaware litigation.

Obviously, it was the deliberate decision of Jan's trial counsel here to abandon the contention. In his brief on the law of appeal, he says that Jan "does not challenge the New York determination that there was no enforcible contract". From a subsequent comment, it appears that he regarded the New York determination as *res judicata*. On that point we do not pass. What we do say is that the new theory was well known and was deliberately abandoned in this case.

In effect, what Jan is contending here is that the legal experts he has heretofore had did not know the Czech law. But, once the theory of tacit-offer had been evolved, why did he not seek to obtain from a Czech lawyer expert advice in support of it? In all probability, reasonable diligence would have borne fruit, since it is clear from the moving papers that some at least of the six affiants were available for consultation before 1954. In any event the effort should have been made if, as is contended, the question was still open for consideration in Delaware. Nothing appears to have been done.

The allegations of paragraph 7 of the petition in excuse of Jan's inaction do not impress us.

The argument upon the supposed difference in background between Thomas and Jan is unconvincing. Thomas'

family was centuries removed from the peasant farm. If Thomas was familiar with the legal effect of a "tacit offer", and relied upon it, as Jan must argue, why was Jan himself not familiar with it? When the sale memorandum was found in Thomas' safe, Jan was advised by the notary to sign it, in order presumably to make a binding contract. As to financial stringency, Jan was in a position to retain able counsel to try this case and an expert to testify.

His location in Brazil is within fifty-five (55) miles of Sao Paulo, a very large commercial city in which he has an office.

It is true that since the Russian seizure of Czechoslovakia he, like others, has been cut off from his native country; but, again, assistance was available in this country and probably elsewhere.

Jan's real difficulty now stems from the decision to abandon in this case the tacit-offer theory. But that decision was made, and was made at a time when it was still possible (as he contends) for him to press it.

It is true that the affidavits, on their face, make in some respects a rather impressive case. As Jan's counsel says, they tend to throw light upon some of the puzzling features of this matter. But the application comes too late.

The Bata litigation has gone on for thirteen years. The suit in Delaware has lasted seven years. Now, at the last moment, Jan asks us, in effect, to open the door to a retrial of the case on a theory known to him and his counsel for at least nine years, and expressly abandoned in the Delaware litigation. He has in our opinion failed to show reasonable diligence in obtaining and adducing the new evidence, and hence has failed to comply with one of the fundamental requirements for the granting of the relief he seeks.

The petition to remand to permit a motion to reopen the case is denied.

We turn now to the six other questions raised by the petition for reargument.

I. It is said that our decision in this case is based upon a collateral attack upon the probate proceedings in Czechoslovakia. These proceedings, it is said, were proceedings *in rem;* they administered and disposed of the estate of Thomas Bata in accordance with the will and sale memorandum left by him, and are conclusive against the World. *Williams* v. *Amroyd*, 11 U.S. (7 Cranch) 423, 432; *Hapai* v. *Brown*, 239 U.S. 502, 36 S. Ct. 201. Hence the title of Jan to the Leader shares, as part of Thomas' estate, was definitely determined in these probate proceedings, and their findings cannot be collaterally attacked.

This contention is new to the Delaware case, but it is not a new idea. It was explicitly presented in the New York litigation, was vigorously pressed, and was rejected by the Supreme Court. On appeal in New York it was abandoned.

There are three answers to this contention.

1. The contention is apparently based upon the same theory advanced in the New York case, *i.e.*, that the Probate Court supervised the fulfillment of an unperformed contract of sale from Thomas to Jan, and delivered to the heirs, by way of the deed of delivery of June 28, 1933, only the "substitute estate" consisting of a claim against Bata a.s.

The first difficulty about this theory is that the probate proceedings were not based upon an unperformed contract of sale, but upon a supposed sale completed in Thomas' lifetime—since determined to be a fiction. It was upon this theory that Jan added to his acceptance of the sale memorandum the phrase: "that is to say, I agreed and purchased as per oral agreement". There is nothing in the probate proceedings about an "unperformed contract". Hence the scope of the deed of delivery was not a recognition of the performance after death of the sale

contract, and cannot be *res judicata* with respect to such performance. "As the proceedings were conducted, there was no obligation of the estate to Jan whose satisfaction the Probate Court was obliged to supervise or determine." Per Mr. Justice Schreiber, 99 NYS 2d 535, 575.

2. Whether Jan's alleged claim to Thomas' industrial property was based on a contract unperformed during Thomas' lifetime, or, alternatively, upon a sale consummated during Thomas' lifetime, is immaterial. In either case the District Court at Zlin had no jurisdiction to determine it, because it involved a sum exceeding 5,000 crowns. For a full discussion of this matter see the opinion of Mr. Justice Schreiber in the New York case. *Bata* v. *Chase Safe Deposit Co.*, 99 NYS 2d 535, 570-576. We are in accord with his opinion for the reasons therein stated.

3. In the New York case, Jan made the express contention "that the Deed of Delivery, executed by the Czech District Court on June 28, 1933, is *res adjudicata* as to plaintiffs and estops them from asserting their present claim of ownership of the property formerly of Thomas Bata, including the shares of Leader.'" 99 NYS 2d 570. After a thorough consideration of the contention Mr. Justice Schreiber concluded as follows (99 NYS 2d 574):

> "Since the District Court of Zlin, which functioned as the Probate Court in connection with the administration of the estate of Thomas Bata, was thus clearly without jurisdiction to determine the merits either of Jan's present claim of a contract unperformed at Thomas' death, or of his claim in the estate proceedings of a contract performed prior to Thomas' death, and since the court was obliged to accept as true and could not question the truth of plaintiffs' declaration in lieu of oath, it is evident that the decree or judgment of the Czech court, though *in rem*, is not *res adjudicata* either as to the validity of Jan's claims or as to the composi-

tion, extent or nature of Thomas Bata's estate. Cases cited by Jan's counsel for the proposition that a decree *in rem* is binding are not applicable here, for in those cases the determinations relied upon as conclusive were made by courts which possessed jurisdiction to make said determinations."

This finding is basic to the New York judgment and necessary to the determination of the heirs' title, because the Czech probate proceedings were invoked in that case, as they are now invoked here, as a final determination that title to the Leader shares passed to Jan. The New York finding in effect determined the "ultimate fact" that the heirs took title to the Leader shares under the deed of delivery. Hence it is a determination binding in this proceeding under the doctrine of collateral estoppel. See the comments on this rule in our opinion on the merits. *Bata* v. *Bata*, Del. Ch. , 163 A.2d 493.

For all of the reasons above stated we think that the first ground for reargument is without merit.

As a part of the discussion of this first ground, petitioner adds a contention which seems to have no connection with the effect of the probate proceedings. It is a contention relating to Westhold Corporation and North River Securities Corporation. These Delaware corporations are merely holding companies for certain of the Leader shares. The contention seems to be that because they were organized after Thomas' death and for a period were controlled by Jan, their shares are his property.

Apparently counsel have overlooked that the only function of these corporations has been to hold title to the Leader shares for the benefit of the real owners. See the Chancellor's opinion on the merits. He says:

"The Delaware corporations were created long after Thomas' death. It is agreed, however, that the ownership will follow, derivatively, the determination

of ownership with respect to the Leader shares." *Bata v. Hill*, 139 A.2d 159, 162.

For the proceedings whereby the shares of these holding companies and the Leader certificates came to be deposited in the Court of Chancery, see the opinion of the Chancellor of March 8, 1955, prior to his opinion on the merits:

> "Those controlling North River concede that they hold the certificates [of Leader] for the party—as between Jan versus Tom and his mother's estate—who is determined to be the rightful owner." 112 A.2d 521.

For a discussion of the status of Westhold, see the opinion of May 6, 1955. 113 A.2d 740.

It is entirely clear that the separate corporate existence of these two corporations ceased to have any significance by the time the case came on for trial.

Jan's belated assertion of ownership of these corporations is wholly without merit.

II. Jan next invokes, as a citizen of Brazil, the protection of the Treaty of Friendship, Commerce, and Navigation of March 18, 1829, and of the Status of Aliens Treaty of June 6, 1930. By the former treaty each nation guarantees to the nationals of the other free access to judicial tribunals. By the latter, it is provided that states should extend to foreigners individual guarantees extended to their own nationals and the enjoyment of essential civil rights.

To find in these provisions any pertinency to this litigation requires some ingenuity. Certainly Jan has been afforded access to the courts of this country to the same extent as a citizen. What counsel says is that the rights guaranteed by these treaties "include the right to respect for the *in rem* Czechoslovakian Probate Proceedings", and a "right to proper recognition for the Dutch Decision", and

a "right to an independent final determination by the Federal Courts". The contention therefore reduces to a reiteration of the *res judicata* arguments based upon the prior proceedings. These arguments have been fully dealt with and rejected. It is now sought to reintroduce them in the guise of a federal question.

We see no merit in this contention.

III. Petitioner builds an argument upon one of the items listed in the May 10th sale memorandum. This item reads:

"Bata Matschapai Amsterdam 51,000 Hol.fl."

This, he says, refers to 51% of the shares of Bata Best. The Dutch Court of Appeals held, he says, that these shares belonged to him. Bata Best subscribed to 890 shares of Leader. Therefore, says petitioner, all the shares of Bata Best, and hence the 890 shares of Leader, have been adjudicated as his.

There are several errors and fallacies in this reasoning.

First, Jan had 225 shares in Bata Best. These were the minority shares. The majority shares—275—were owned by Leader. This is clear, not only from the New York record, but from the case in the Restitution Court, in which Jan complained that the cancellation of the shares issued under the German control would leave control of Bata Best with Leader.

Second, although Bata Best subscribed to 890 shares of Leader, the certificates were deposited in a Zurich bank in the custody of Muska, as we have heretofore pointed out.

Third, the whole contention rests upon the assumption that the Dutch Court of Appeal finding of sales legacy is binding here. This question has been disposed of adversely to Jan.

We find nothing of substance in this contention.

With respect to all three of these contentions we note that none of them was made below, nor was any of them made on appeal. They are brought forward for the first time

on reargument. We might have summarily refused to consider them because of the rule forbidding a change of legal theory at such a late stage of the proceeding. See *Stephenson* v. *Commonwealth & Southern Corporation*, 19 Del.Ch. 447, 168 A. 211; cf. *Kerbs* v. *California Eastern Airways*, 33 Del. Ch. 174, 91 A.2d 62.

But petitioner has been required to bring new counsel into the case, because of the death of his former counsel. We have accordingly thought it desirable in this case to deal with these matters on the merits.

IV. The next ground assigned concerns the Parry visit to Jan in Brazil in 1942. This resulted in an agreement for the control by a committee for the duration of the war of certain of the operating companies. This action was the outcome of the placing of Jan Bata on the British blacklist. It was a temporary expedient, devised to meet the difficult situation arising from Jan's refusal to state definitely who were the ultimate owners of the Bata enterprises. This is touched upon in our opinion on the merits. 163 A.2d 500.

The agreement made no attempt to settle the matter of ownership of the Leader shares. It does deal with control, but there has never been any doubt about the fact that after the death of Thomas Jan succeeded to control of the enterprise.

The Parry mission is one of those happenings during the war years which, as the Chancellor said, confuse rather than assist the trial judge in reaching the basic issue.

V. Under the heading of "Other Grounds" the petitioner assails as erroneous the four principal questions dealt with in our opinion of August 3, 1960. No adequate reason is put forward as ground for changing our opinion or granting reargument on any of these points.

VI. Upon the hypothesis that reargument on the merits may be denied, Jan raises again the question of compensation. He cites *Williams* v. *Gibbes*, 61 U.S. (20 How.) 535, 15 S.Ct. 1013, for the proposition that if A renders service to B in recovering property under the belief that he is the owner of such property, A is entitled, upon the award of the property to B, to compensation out of the fund as a trustee. We have no quarrel with this general proposition. The difficulty is to apply it to the situation in this case. Although Jan filed his claim as a trustee, he was unwilling to give up his claim as owner of the minority shares. We gather that he is still unwilling to do so.

In these circumstances, we are still unable to see how a proper award of compensation can be made until the disputed question of the ownership of those minority shares shall have been determined. See our opinion on this point, 163 A.2d 524. We are not unsympathetic with Jan's position, but we find no reason to change our opinion upon this matter.

Jan contends that the requirement that he abandon his claim to the minority shares as a prerequisite to compensation is an unconstitutional attempt by the Delaware courts to reach property beyond their jurisdiction. On the contrary, the deposit is permissive, and the Chancellor's order, as modified by this Court, will be without prejudice to any future claim of Jan, both as to the minority shares and to compensation.

It is suggested, alternatively, that the Leader shares should be retained in the custody of the court "until the amount of his compensation is determined, * * *". We cannot follow this suggestion. As we have held, the amount of compensation depends somewhat upon Jan's ownership or non-ownership of the minority shares. That question cannot be litigated in this proceeding, for the issue is not before the Court of Chancery. Is Jan suggesting that delivery of the Leader shares to the plaintiffs should be

withheld indefinitely pending determination, in some proceeding not yet even begun, of the title to the minority shares? Such an order, in our opinion, would be wholly unwarranted.

For the reasons above set forth, the petition for reargument, including the petition to remand the cause to the lower court to permit petitioner to move to reopen it, is denied.

There remains for consideration only a question of costs.

On August 15, 1960, the appellees filed a certification of the costs of printing their appendix.

On August 17, 1960, the appellant filed an application for a special order taxing the costs in this Court against appellees. Appellees filed a memorandum in opposition to this application.

In the court below the Chancellor, citing *Kennedy v. Emerald Coal & Coke Co.*, 27 Del.Ch. 55, 30 A.2d 268, held that the circumstances of this case justified the assessment of costs against the property in the court—or against the successful plaintiffs if they preferred. 143 A.2d 728, 738.

We are of the same opinion with respect to the costs in this Court. The circumstances of the case are highly unusual. It is unnecessary to set forth all the facts which make the case somewhat analogous to a case in which a fund is before the court for distribution.

Accordingly, the application of appellees that the certified costs be taxed against the appellant is denied.

All of the costs in this Court will be taxed against the appellees.

In accordance with the order of the Chief Justice of January 13, 1961, the issuance of the mandate of this Court is stayed for a period of ten days from the date of filing this opinion, in order to permit petitioner to make the application referred to in that order.

Supreme Court of Delaware
Court House
Wilmington, Delaware
May 1, 1961

Clarence A. Southerland,
Chief Justice

Re: *Bata* v. *Bata*—*No. 48, 1958*
Application for further stay

George T. Coulson, Esquire
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3000 DuPont Building
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The Hon. Harold E. Stassen
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Inzer B. Wyatt, Esquire
Sullivan and Cromwell
48 Wall Street
New York 5, New York

Dear Sirs

I have considered the application of appellant for a stay of ninety days within which he may apply to the Supreme Court of the United States for a writ of cer-

tiorari, and, if such application be made, for a further stay until the final disposition of the cause by the Supreme Court of the United States.

Appellant contends that he has raised, on petition for re-argument, a substantial federal question. That question, he says, arises under the treaties between the United States and Brazil, which accord to him the same rights in our courts as are accorded to our own citizens. One of those rights, he claims, is the right to have the federal courts pass on the question of the validity and effect of the probate proceedings in Czechoslovakia as an adjudication *in rem* of his title to the property in dispute. This question, it seems to me, presents only a question of conflict of laws in the enforcement and recognition of foreign judgments. This subject is not covered by the treaties with Brazil. It appears that, generally speaking, the states are free, in the absence of such a treaty, to accord to foreign judgments such recognition as they think proper. Cf. Nadelmann, "Non-Recognition of American Money Judgments Abroad," 42 Iowa L. Rev. 326.

I am not cited to any authority supporting the view that the facts of this case present a federal question.

In *Magnum Import Company, Inc.* v. *City*, 262 US 159, 163, Chief Justice Taft stated the following considerations to be weighed by a Circuit Court of Appeals or a State Supreme Court in exercising its discretion in granting a stay:

> "• • first whether the case is one likely under our practice to be taken up by us on certiorari, and, second, whether the balance of convenience requires a suspension of its decree • •."

I think that the appellant has not presented any substantial federal question.

I am authorized to say that the other members of the Court concur in this view.

For the foregoing reasons, the application is denied. However, a further stay of fifteen days from the date of final judgment will be granted to appellant within which to apply to a Justice of the Supreme Court of the United States for a review of this decision.

Counsel are requested, if possible, to agree upon and submit a draft of final judgment.

Very truly yours,

S/ CLARENCE A. SOUTHERLAND

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAN A. BATA,

Defendant Below,
Appellant,

v.

THOMAS J. BATA, *et al,*

Plaintiffs Below,
Appellees.

No. 48, 1958

FINAL JUDGMENT.

AND NOW, TO WIT, this 4th day of May, 1961, the above entitled appeal from the final decree of the Chancellor of September 26, 1958 and from paragraphs (2) and (3) of the order of the Chancellor of September 15, 1958, concerning claims, having been determined by the Court's opinions of August 3, 1960 and April 25, 1961, in which latter opinion defendant's petition for reargument and remand were denied and costs were taxed, it is

ORDERED and ADJUDGED as follows:

1. The final decree of the Chancellor of September 26, 1958, and the order of September 15, 1958 concerning claims, are affirmed subject to the modifications necessary to conform such decree and order to the provisions of the opinions dated August 3, 1960 and April 25, 1961 dealing with defendant's (*i.e.* Jan A. Bata's) claim for compensation; and the cause is hereby remanded to the Court of Chancery in and for New Castle County for the purpose of entering such modifications.

2. Costs are hereby taxed against plaintiffs in the sum of

3. The Clerk of this Court shall remit to the Register-in-Chancery in and for New Castle County the records in this case together with a duly certified copy of the opinions dated August 3, 1960 and April 25, 1961 and of this Final Judgment, which shall constitute the mandate of this Court.

4. Issuance of this Court's mandate and the provisions of paragraphs 1, 2 and 3 hereof are stayed for fifteen (15) days from the date of this Final Judgment to permit appellant to apply to a Justice of the Supreme Court of the United States for a further stay in which to present a petition for a writ of certiorari, or for the purpose of presenting such petition.

5. If within fifteen (15) days of the date of this Judgment, appellant shall obtain a stay of this Judgment pending an application to the Supreme Court of the United States for a writ of certiorari in this cause and a certified copy thereof is furnished to the Clerk of this Court, the Clerk of this Court may transmit the original records herein duly certified to the Clerk of the United States Supreme Court in conjunction with the filing of a petition for a writ of certiorari, upon payment by the appellant of the costs for such transportation and return.

In the event no such stay is obtained by appellant during said period of fifteen (15) days from the date of this Judgment, the original records herein shall be remanded to the Court of Chancery for further proceedings in accordance with the provisions hereof; provided, however, if appellant after such remand shall petition for a

writ of certiorari the records herein shall be returned to the Clerk of this Court for transmittal, as above set forth, to the Clerk of the Supreme Court of the United States.

S/ CLARENCE A. SOUTHERLAND
Chief Justice

S/ DANIEL F. WOLCOTT
Justice

S/ HOWARD W. BRAMHALL
Justice

APPROVED AS TO FORM:

S/ GEORGE T. COULSON
Attorney for Defendant below, Appellant

S/ ROBERT S. RICHARDS, JR.
Attorney for Plaintiffs below, Appellees

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960 No.

JAN A BATA

Petitioner

v.

THOMAS J. BATA, THOMAS J BATA and DAVID GRAHAM as Executors of the Estate of Mary T BATA and WESTERN INVESTMENT AND TRADING COMPANY LIMITED, a Bermuda Corporation

Respondents

APPENDIX B

To Petition for Writ of Certiorari

Czecho-Slovakian orders, decrees and [illegible] proceedings, and the May 31, 1931 and [illegible] 1931 documents, all in the agreed English translations

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APPENDIX B

Czechoslovakian records in agreed English translations

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The May 10th, 1931 Holographic Document	13
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(DEFENDANT'S EXHIBIT 98)

TRANSLATION

of an excerpt from the Estate and Surrogate Files, File No. D 297/32, P. 120/32.

File Number of Revenue office in Napajedla, entry of the Register of Fees 3002 ai 1933—Entry in the Assessment Register: 4.757/33.

Table of contents of files, or respectively copy of table of contents D 297/32 enclosed.

Pages 1-2: Death certificate issued by the City office of the City of Zlin on July 16, 1932.

Page 3: Minutes recorded in the District Court in Zlin of July 16, 1932, by Judge Dr. Klener: "There appeared Dr. Evzen Saller, Advocate in Zlin, and submitted to the Court the death certificate of the late industrialist Thomas Bata and requests that this certificate be taken note of by the District Court and that the persons mentioned in the codicil, who will orally make their wishes concerning the liquidation of the estate known to the Court, be summoned. "agd. Dr. Saller, m.p. For the Court: Dr. Klener, m.p. and Krystof, m.p.

Page 4: Official notice on publication of the will in the district court in Napajedla, and copy of the will of February 20, 1908. The files turned over to the Court here (in Zlin).

The official notice contains, among others, the statement by Thomas Bata: "Please deliver only personally to Thomas Bata, or, after his death, open in the presence of my wife Maria Bata of Zlin, my sister Anna Schiebel of V. Lukov, and my brother Jan Bata of Zlin.

Page 5: Publication of the will.

Page 6: Transcript of the will.

Page 7: Transfer of the file to the Court in Zlin.

Page 8: Notary Felix Talpa of Napajedla submits the last will of T.B. to the District Court in Napajedla.

Page 9: Minutes recorded in the District Court in Zlin on July 13, 1932. Copy is enclosed.

Pages 10-13: Transcript of the will of January 29, 1918, published in the District Court in Zlin on July 13, 1932 (certified copies).

Pages 14-16: Publication of the will of May 19, 1931, transcript of the will of May 19, 1931 and of the accompanying note without date (photostat).

Page 17: Letter to Mrs. Maria Bata, whether she herself wants to be guardian, and in that case she should suggest to the Court a suitable curator.

Page 18: Minutes of July 22, 1932, recorded with Dr. Alexander Mensik, Chief of District in Prostejov, concerning the prospecting rights.

Page 19: Decision of the District Court in Zlin whereby Dr. Mensik is appointed Curator ad actum for this Estate by the Estate Court.

Page 20: Letter from the Revenue Office of Sumperk to the Court.

Page 21: Original letter from Mrs. Maria Bata dated August 3, 1932, to the District Court of Zlin, reading as follows:

"In reply to your letter of the 19th of last month, I advise that my son Thomas Bata was born in Prague on September 17, 1914. I shall myself be guardian to my minor son and I intend to declare him of age on the day of his 18th birthday, *i.e.* on September 17, 1932.

Respectfully, Maria Batova, m.p."

Page 22: Jan Basant, Engineer, files his claim in the amount of K. 150,000.00 against the Estate.

Page 23: Power-of-attorney of his Counsel Dr. Karel Ruzicka.

Page 24: Minutes recorded in the District Court in Zlin on September 2, 1932, by Judge Kuns, Secretary Ambruz, "There appeared Mrs. Maria Bata, widow of the industrialist in Zlin and assumed the office of guardian over the minor Thomas Bata, born September 17, 1914, and acknowledged receipt of the decree. Authentic signature Maria Batova, and for the Court: Kunz and Krystof."

Page 25: Birth date of the minor Thomas Bata, father Thomas Bata, mother Maria nee Mensik, born on September 17, 1914. The entry includes the mention: born perhaps September 17, 1914 in the Dr. Haussmann Sanitarium, Praha-Vinohrady, and baptized in the church there. Issued by the Main Parish St. Stephan In Prague II on September 3, 1932, signed: Vaclav Bartunek."

Page 26: Prof. Jan Bazant withdraws his claim, as he was paid by the Bata Company.

Page 27: Minutes concerning the declaration that the minor Thomas Bata is now of age (photostat).

Page 28: Inquiry of the Court Commissioner Dr. Förster to the Bata Company concerning the balance of the claim plus interests which the deceased had against the Municipality of Zlin.

Page 29: By letter of September 27th the Bata Company informs the Notary that the balance as of July 12th was Kc. 4,162,131.90.

Page 30: The Notary consults the Revenue Office in Napajedla concerning the tax payments due.

Page 31: Ditto.

Page 32: Presumably the statement of tax payments due is not on file.

Page 33: By letter of October 26, 1932, the Revenue Office in Jihlava files a claim of Kc. 12,849.25.

Page 34: Letter from the Revenue Office in Kolin to the Revenue Office in Uh. Kradiste informing about tax payments due in some villages with a balance of Kc. 27,054.90 turned over to the Estate Court on November 5, 1932.

Page 35: Letter of the Revenue Office in Holice to the District Court in Uh. Hradiste of November 16, 1932, showing a balance due of 3,054.20.

Pages 36 and 38: Petition of Mrs. Maria Bata and Thomas Bata for approval of two declarations of satisfaction of mortgages (page 37 is missing).

Pages 39-41: Petition of Maria Bata and Thomas Bata for approval of two petitions to the Mining District Office in Mor. Ostrava and Brno.

Pages 42-44: A petition of the same for approval, by the Estate Court of the petition, that the name of Thomas Bata, Sr. be removed as partner in the firm of Wolf & Frank in Prostejov.

Pages 45, 46, 47: Petition of Maria Bata and Thomas Bata for the approval of the material instrument, *i.e.* contract of transfer, whereby the petitioners, all of age and acting in their own right, have transferred to Jan Bata the shares of the company Tisk G.m.b.H. (dated Dec. 23, 1932).

Page 48: Office notation concerning Maria Bata's communication by telephone that her son has left for Germany.

Page 49: Carbon copy of a letter from the Notary as Court Commissioner to the Bata Company, Tax Depart-

ment, pointing out that interests will be payable upon expiration of the period of six months, unless the statement of the estate is filed.

Page 50: Inquiry by the District Finance Administration in Uh. Hradiste dated December 20, 1932, at the Estate Court about the status of the case.

Page 51: Inquiry by the Court to the Notary in the same sense and the reply to the District Finance Administration.

Page 52: Petition of Maria Bata, also in the name of Thomas Bata, for the granting of an additional period of six months for the settlement of the estate.

Page 53: Decision of the Estate Court concerning extension of the term to April 20, 1933.

Page 54: The Revenue Office in Jihlava communicates the tax payments due as of Oct. 13, 1925 in the amount of 1,310.25 Czech crowns.

Page 55: Bata A.G. advises by letter of January 25, 1933 to the Notary Dr. Förster that it has deposited with the Revenue Office in Napajedla on January 9, 1933, the amount of 7,374,849.00 as an advance payment.

Page 56. By letter of February 18, 1933, the Finance Ministry requests that the estate files be sent in.

Page 57: Letter from Dr. Pavel Posamentir, Counsel in Mor. Ostrava, dated Feb. 25, 1933, concerning costs.

Page 58: The reply of the Court to this Counsel stating when Thomas Bata died and who his heirs are.

Page 59: Letter from Dr. Posamentir to Notary Förster concerning his claim for costs.

Page 60: Reply of the Court Commissioner to Dr. Posamentir that the heirs have not submitted any declaration to date.

Page 61: Petition to the Registry of Real Property and decision of the District Court in Kezmarok on cancellation of the lease rights.

Page 62: Petition of Maria Bata, also in the name of Thomas Bata, for further extension of the term.

Page 63: Inquiry by the Commerce Court in Vienna, File No. Reg. C. 4/58-5, as to who handles the estate left by the deceased Thomas Bata, turned over to the Notary.

Page 64: Reply of the Estate Commissioner to the Commerce Court in Vienna, Division 8, dated May 8, 1933.

Page 65: Inquiry of the County Court, as Press Court, in Litomerice dated May 3, 1933, to the District Court in Zlin as to who is the authorized representative of the estate left by Thomas Bata.

Page 66: Reply of the Estate Commissioner to the County Court that the legal heirs are the spouse and the son.

Page 67: The Finance Ministry requests presentation of the estate files by return mail under File No. 67.798/33-V-16 of June 3, 1933, taken care of, asking for promptest possible return of the files. The Finance Ministry sends the files back to the District Court in Zlin, Division I, with letter of June 17, 1933, File No. 69,385/33-V/16.

Page 68: Maria Bata and Thomas Bata file declarations dated June 8, 1933, that they are heirs (to be copied).

Page 69: Decision of the District Court in Zlin of June 8, 1933, whereby the District Court accepts the declarations of succession to Thomas Bata, deceased on July 12, 1932, having left a testamentary disposition (to be copied).

Page 70: The (Revenue Office?) in Napajedla requests by letter of June 20, 1933, No. 1574, that the report of tax

payments due be returned, since in view of the definitive regulations for the year 1931 the tax payments due appear to be paid. Official notation of the Notary about return of the certificate.

Page 71: Petition of Mrs. Anna Schiebel and her children dated June 18, 1933, concerning division of the bequest.

Page 72: Letter from the Revenue Office in Kolin dated June 22, 1933, to the District Court in Zlin, withdrawing the notification, as the taxes were paid.

Page 73-76: Minutes of June 23, 1933 (photostat).

Page 77: Communication from the Estate Commissioner to the Revenue Office in Holice that the heirs do not recognize the liquidation of taxes due in the amount of Kc. 3,054.20 on the estate, as this amount is a claim against the firm T. A. Bata and not against the testator.

Page 78: Ditto to Revenue Office in Jihlava concerning the amount of Kc. 5,310.25.

Page 79: A letter of the Notary to the Bata Company whereby the Notary requests the company to pay the amount as per settlement made with it by Mr. J. A. Bata in favor of the testator (to be copied) dated June 26, 1933.

Page 80: Letter from the Notary dated June 26, 1933, to the Bata Relief Fund to the effect that Thomas Bata by testamentary disposition of May 19, 1932, left to his employees, among other things, the amount of Kc. 21,500,000, with the proviso that this amount is to be paid into the Relief Fund within 5 years at a rate of interest of 5%.

Page 81: The same to the Municipality of Zlin concerning the amount of Kc. 4,300,000, the exact amount of which on the day of the testator's death was 4,162,131.00 (to be copied).

Page 82: Letter from Notary Talpa of Napajedla dated June 26, 1933, that the heirs have paid his invoice for 93.75.

Page 83: Judicial deed of delivery ("Einantwortungsurkunde") D 297/32 of June 28, 1933 (to be copied).

Page 84-85: The decree on the settlement of the estate (to be copied).

Page 86: Letter from Dr. Hak, Counsel in Jilemnice, dated June 3, 1933, asking to whom the estate left by the late Thomas Bata was judicially transferred.

Page 86: Letter from the Bata Relief Fund in Zlin dated June 28, 1933 signed by Chairman Dr. D. Albert and by the Secretary B. Kupec (to be copied).

Page 87: Reply of the Court to Dr. Hak, Counsel in Jilemnice.

Page 87: Petition of Bata A.G. that the enclosed documents (cancellations of the rights of option and lease) be approved by the Estate Court.

Page 88: By letter of December 1, 1933, Form V Item 15,393/33, the Tax Assessing Office in Brno communicates to the District Court in Zlin through the District Finance Administration in Uh. Hradiste:

"Re File No. D 297/32 we advise that from the estate left by Thomas Bata, deceased on July 12, 1932, fees (taxes) in the amount of Kc. 9,080,210.00 including interests were assessed under item 3,002/33 Register of Fees of the Revenue Office in Napajedla. Signed: Janos. The estate files are being returned."

Page 89: The petition of the District Civil Court in Prague, Dept. X, of January 19, 1934, for mailing of the estate files; taken care of immediately.

Page 90: The Revenue Office in Napajedla requests transfer of the estate files for the purpose of answering the appeal concerning fees. Signed Zavadil.

Page 91: Petition of the Bata Company, represented by Dr. Förster, for issuance of an official attestation described therein that according to the result of the estate proceedings and according to the deed of delivery there appear as sole legal heirs to the late Thomas Bata his wife Maria Bata and his son Thomas Bata.

Page 92: The desired attestation was issued on March 18, 1934.

Page 93: Petition of Maria Bata and Thomas Bata, represented by Dr. Förster for approval by the Estate Court of a declaration concerning cancellation of the right of option and lease in the Township of Utery, Bohemia.

Page 94: The District Civil Court in Prague, Dept. X, requested on April 28, 1934, mailing of the estate files; taken care of on May 4, 1934; the files were returned and asked for once more.

Page 95: On May 15, 1934, the Revenue Office in Napajedla communicates to the District Court in Zlin the following: "The Assessment (Revenue) Office advises concerning File No. D 297/32 that the fees (taxes), which were assessed in the amount of 9,080,210 from the estate of Thomas Bata, deceased on July 12, 1932, at the Otrokovice Airport, were paid in full today, May 15, 1934. Signature illegible."

Page 96: The Bata Company, through Dr. Förster, requests issuance of an official certificate that the estate was settled and delivered to the legal heirs M.B. and T.B.

Page 97: On May 30, 1934, the District Court in Zlin issued this official certificate.

Page 98: Petition of the Bata Company for issuance of another official certificate to the same effect.

Page 99: The District Court issued this certificate on June 22, 1934.

Page 100: The Bata Company, represented by Dr. Förster, requests certificate to the same effect.

Page 101: The District Court issued this official certificate on September 14, 1934.

Page 102: Petition of Marie B. and T. B. represented by Dr. Förster for approval by the Estate Court of the Enclosed cancellation document concerning right of option and the lease right in the Chlumec Registry of Real Property.

Page 103: The above persons, represented by Dr. Förster, request approval of the cancellation document concerning the lease right in Velky Polom.

Page 104: The above persons request approval of the document for cancellation of the option and lease rights in Dubove.

Page 105: The above persons request approval of cancellation of the lease and option rights in Mastove.

Page 106: On December 3, 1934, the District Court in Zlin sends the estate files to the Civil Court in Prague regarding their File No. Ck X 364/32.

Page 107: The heirs, through Förster, request approval of the cancellation of the lease and option rights in Vapeny Podol.

Page 108: The same for cancellation in Blovice.

Page 109: The Bata Company through Dr. Förster requests certificate on who the legal heirs to the late Thomas Bata are.

Page 110: The District Court issues the official certificate on January 15, 1935.

Page 111: Change in the Register of Commerce of the Commerce Court in Vienna as per resolution of January 15, 1935, Division 8 (to be copied).

Pages 112-113: A petition of the Bata Company for approval by the Estate Court of a declaration (to be copied).

Page 114: Extract from the Registry of Real Property E.Z. 444 of the Registry of the Township of Lustenice, House conser. No. 114.

Page 115: Certificate of service.

Page 116: Declaration of Maria Bata and Thomas Bata concerning the property in Lustenice stating that this property has been transferred to the assets of the Bata A.G. (to be copied).

Page 117: Missing, is not on file.

Page 118: Bata, A.G. Zlin, Renting Department, Prochazka, with petition to the District Court concerning writing off a piece of property in favor of the public estate.

Pages 119-120: The pertinent transfer contract.

Page 121: Bata, Renting Department, requesting cancellation of the the option and lease rights.

Page 122: The pertinent declarations of release.

Page 123: Bata Company requests cancellation of the right of option.

Page 124: The County Court in Uh. Hradiste II requests on April 17, 1933, mailing of the estate files. This was done and the files were returned.

Page 125: Return of the files to the County Court in Uh. Hradiste upon its second request, asking that they be sent back to the Estate Court promptly.

Page 126: The District Civil Court in Prague I, Ovocny trh 18, requests mailing of the files. This was done on April 20, 1936.

Paris akc. spol		500,000 Kc
Atlas insur.		3,000,000 Kc
Busi	Trebic	10,000,000 Kc
Budisovsky	Trebic	10,800,000 Kc

From these values is excluded the landed property Loucka a Lazy as well as my residential house in Zlin

Besides these enumerated values I sell to you all my property even if it is not enumerated here for the amount of Kc 50,000,000 fifty million K.c. Czechoslovak currency.

You are under obligation to pay this purchase price in cash within one year from taking over the companies and to pay 5% interest pro ano.

(signed) Tomas Bata."

"From the sold property is further excluded the debt which we have against the city in the amount of approx. 4,300,000 that is by such amount the purchase price is increased and J. A. Bata is under obligation to pay such amount to the city of Zlin. (signed) Tomas Bata"

The May 19th 1931 document

(NOTE: The second document was dated May 19, 1931 and was in envelope labelled "My Last Will". (Defendant's Exhibit 74.)

It is reproduced in the approved English translation as follows):

"My last will:

Made on the day 19/5 1931
My property as of today
consists of .

Claim against J. A. Bata of .		
for all shares sold xx domestic and foreign comp.	Ke	50,000,000
My dwelling house in Zlin		100,000
Landed estates Loucka and Lazy and Schmergerle		3,000,000
Claim against the City of Zlin—About		4,300,000
		57,400,000

From this my property I bequeath

To my wife Mrs. Marie Bata Landed estates Loucka Lazy Semergerle		3,100,000
Further in cash	Ke	5,000,000
To my son Tom Bata his legal quota	Ke	22,000,000
with the provision that this his property shall be administered by his mother until he reaches 22 years of age. The proceeds shall be used for his education and the remainder shall be deposited for his benefit.		
		30,100,000

(second page)

Carried forward	30,100,000
To my sister Anna Schiebel I bequeatl.....	1,500,000
To the City of Zlin the debt.....	4,300,000
with Bata a.s. J. A. Bata will pay	
The balance :.....	Kc 21,500,000
I give to my fellow workers.	57,400,000

This amount is to be paid within 5 years with 5% interest to the Bata Workers Aid Fund and is to be administered in the spirit of the now effective by-laws.

It is understood that I have drawn up this last will with full understanding being of sound mind and without duress and in my own handwriting.

/s/ Tomas Bata

My previous testament hereby naturally loses its validity.

/s/ Tomas Bata"

(NOTE: After the death of the deceased on July 12, 1932 both documents were turned over to the custody of Dr. Hugo Foerster, probate court commissio ier and notary public.

On the May 10, 1931 document these writings were added after death.

"(signed) Dr. Hugo Foerster
Notary
In our presence on 7/12,32
opened by J. A. Bata

(signed) Dr. A. Mencik
(signed) Cipera
(signed) Varecka"

The Supreme Court of Delaware stated in its opinion "at the suggestion of Dr. Foerster, Jan wrote on the document: 'I agree and purchase. Jan A. Bata' on the next day

Jan added the words: 'that is to say, I agreed and purchased as per oral agreement'." As noted above, Dr. Foerster was the Probate Court Commissioner.

Dr. A. Mencik was the brother of Mary Bata and the uncle of the plaintiff Tom Bata in this action.

Cipera was the principal financial officer of the domestic Bata companies and was also a relative of the plaintiffs herein.

Vavrecka was a principal officer of the Bata company and also a relative of the plaintiffs herein.

On the May 19th document the following endorsement was added after the death of Thomas Bata:

> "Published at the District Court in Zlin on the 13th day of July 1932
>
> (signed) Loucka Bohumil"

The seal of the District Court in Zlin was affixed.)

(Defendant's Exhibit 86)

(Agreed Translation from Czech)

(Round Seal of the District Court in Zlin) (Illegible words & figures) Div. I on the day 13/7/32

PROMULGATION

of the last will of: Thomas Bata, industrialist in Zlin deceased on the day 12 July 1932

Present:

1./ Bohumil Loucka, District Judge
2./ Dr. Hugo Foerster, Notary in Zlin

Witnesses: M.U. Dr. Rudolf Gerbec, Physician in Zlin
J.U. Dr. Evzen Saller, lawyer in Zlin
Dominik Cipera, employee in Zlin

1. Number and date of found last Wills:
One with the date May 19, 1931

2. Who has submitted it to court?
Dr. Hugo Foerster, Notary in Zlin

3. Were the documents submitted opened or sealed?
In intact, sealed envelope.

4. Is the last will likely written by own hand of the testator?
Yes

5. Was there found any damage of seal or on the document itself some erasing, correction or something otherwise suspicious?

On page I: None.

On page II: between the sixth and seventh lines written in words: "to be paid within 5 years with 5% interest" and stricken out: "is payable" and "to be paid in cash."

(Continuation Defendant's Exhibit 86)

The last will was read.

Signatures:

(Sgd.) Marie Bata
(Sgd.) Tomas Bata
(Sgd.) Anna Schiebel

(Sgd.) Jan A. Bata (Sgd.) Dr. Gerbec
As witness

U. (Clerks: instructions for filing)

Certified copy for the records.
Original with collection of documents.
Service according to form 18.

As witness
(Sgd.) Dominik Cipera

(Sgd.) Dr. Evzen Saller
As witness

Statement of pious bequests.
(Sgd.) Dr. Hugo Foerster
Notary

(Sgd) Loucka

(Translator's note: Underlining denotes handwriting.)

(Defendant's Exhibit 85)

TRANSLATION

COPY

index No. D 297/32
6

Record

taken by the District Court in Zlin department V
on July 13, 1932

The Judge: Dr. Klenner

Witnesses: Dr. Evzen Saller, attorney at law in Zlin: Dr. Hugo Foerster, notary public in Zlin.

Estate
of
Tomas Bata, industrialist in Zlin, deceased on July 12, 1932

Publishing of last will:

1/ number and date of last will found: One dated 1/29/1918 with 9 enclosures.

2/ Who submitted them to the court? Dr. Hugo Foerster, notary public in Zlin who has taken over the last will from the District Court in Napajedly where it had been deposited with Felix Talp notary public.

3/ Were the produced documents open or sealed? In a sealed envelope.

4/ Has the last will been likely written by decedent's own hand? NO.

5/ Has been ascertained any breach of the seal, or on the document itself any correction, erasing or anything else being suspicious?

The last will was read.

Signature:

Marie Batova m.p.
Jan A. Bata, m.p.
Anne Schiebelova, m.p.
Dr. Saller witness m.p.
Dr. Hugo Foerster notary public m.p.
Dr. Klenner m.p.

(NOTE: This certificate was issued during the probate proceedings and prior to the June 28, 1933 deed of delivery in the probate proceedings, approved translations of pertinent parts of which are as follows: (Defendant's Exhibit 160) (After quoting a part of the May 10, 1931 document))

"*Official Certificate*

The DISTRICT COURT of ZLIN as the Court of Justice competent to deal with and to wind up and distribute the Estate of Thomas BATA late of ZLIN, Manufacturer, deceased on the 12th of July 1932 HEREBY CERTIFIES THAT the annexed certified copy of an instrument dated the 10th day of May 1931 *inter alia* legally arranges the transfer of ownership in respect of shares of the BATA SHOE Co. New York to Mr. John A. Bata, Manufacturer of ZLIN and that by virtue and under said instrument Mr. J. A. BATA has, according to the Laws of Czechoslovakia, the right to claim that said shares be transferred and entered in his name.

The District Court of Justice at ZLIN, Division I. on this 28th day of April 1933.

L.S. Signed Dr. KLENNER

"I HEREBY CERTIFY THAT the foregoing extract agrees entirely with the respective passages of a certified copy of an instrument dated the 10th of May 1931 and also with the original Official Certificate attached to the foregoing certified copy.

GIVEN at ZLIN, on this tenth day of May of the year One thousand nine hundred and thirty three. /10. V. 1933 /.

Signed Dr. Hugo Forster.
Notary Public."

(DEFENDANT'S EXHIBIT 88)

Translation from Czech 68

Copy

Reference to No. D 297/32
47.

The District Court in Zlin
Received on June 6th, 1933.

The District Court
in Zlin

Duty
Stamp
for Kc. 5

The application of Marie Bata and Thomas Bata, both of Zlin,

for the acceptance of declarations of inheritance by the Court in the Estate of Thomas Bata, industrialist in Zlin, deceased on July 12th 1932.

On July 12th 1932 died Thomas Bata, industrialist in Zlin to whom we undersigned: the wife Marie Bata and the son Thomas Bata, both from Zlin, succeed as legal heirs according to the Death Certificate.

Attesting our inheritance right by the Death Certificate and by the mutual recognition we both make the declaration of inheritance of the Estate of Thomas Bata deceased unconditionally according to law as heirs and we apply for the acceptance of these declarations by the Court.

We apply at the same time that the written copy of the Decree concerning the acceptance of our declarations be served on us.

Zlin, June 8th 1933

(sd) Thomas Bata (sd) Marie Bata

(DEFENDANT'S EXHIBIT 89)

Translation from Czech

Copy

D 297/32
48

DECREE:

The declaration of inheritance from Thomas Bata, industrialist of Zlin, deceased on July 12th, 1932, leaving the Last Will, filed by the surviving wife Marie Bata and the surviving son Thomas Bata unconditionally, according to law, has been accepted by the Court.

The inheritance right has been attested by the Death Certificate and by the mutual recognition.

The District Court in Zlin Dep. I
June 8th, 1933

(sd.) Dr. Klenner

Translation from Czech D-89 id

The Official Note:

The records were served on the Court Commissioner for further settlement on June 19th, 1933.

Zlin, June 19th, 1933.

(Sd.) Dr. Hugo Foerster,
notary
as the Court Commissioner

(DEFENDANT'S EXHIBIT 90)

Translation from Czech

[Seal of the District
Court of Zlin over
the duty stamp]

D 297/32
52

Record of Hearing
of 23 June 1933

taken by Dr. Juris Hugo Foerster, notary public in Zlin in the capacity of a commissioner of the court in the probate proceedings of the estate of Thomas Bata, manufacturer in Zlin, who died 12 July 1932, having a last will.

PRESENT ARE
THE UNDERSIGNED:

The subject matter of the hearing is the inquiry into the estate and succession of the above decedent.

According to the record of the inquiry into the circumstances of death [and succession] the following succeed as legal heirs:

I. [The surviving] wife Marie Bata in Zlin, post office box 292.

II. [The surviving] son Thomas Bata in the same place, who was declared to be of full age by the decision of the district court in Zlin of 21 September 1932, No. P 120/32/17.

Being summoned, there have appeared: the surv[iving] wife Marie Bata and the surv[iving] son Thomas Bata, who state that there are no other legal heirs except the above mentioned.

It is established that by the decisions of the district court in Zlin of 23 December 1932, and 21 April 1933,

a period of time until 21 June 1933, was granted to the legal heirs for consideration of the succession, and the records of the probate proceedings, which were requested by the Ministry of Finance on 3 June 1933, were returned to the commissioner of the court on 19 June 1933, for further proceedings.

P.2 of the original] The decedent has left 3 last wills, *viz*: of 20 February 1908, which was promulgated by the district court in Napajedla on 13 July 1932, further, of 29 January 1918, with 9 appendices, which was promulgated by the district court in Zlin on 13 July 1932, and of 19 May 1931, with a supplement to the last will, which was promulgated by the district court in Zlin on 13 July 1932.

All three above mentioned last wills were read to the parties present.

It is established that the test[ator] in his last will of 19 May 1931, which is written and signed in the test[ator's] own hand, has provided among other things: "My previous testament is thereby naturally deprived of its validity."

Thus, by this provision the test[ator] has invalidated, within the meaning of Sec. 719 of the General Civil Code, his previous last wills of 20 February 1908, and 29 January 1918, and the participants present, being duly instructed have taken notice thereof and have declared that they recognize in consequence thereof the test[ator's] last will of 19 May 1931, with its supplement to the last will, as a legally valid codicil.

It is established that by the declaration of 8 June 1933, No. 3297/32-47, the following have declared their claim to this estate unconditionally according to the law as heirs: the surv[iving] wife, Marie Bata, and the surv[iving] son, Thomas Bata, and their declaration of claim to the estate was accepted by the court decision of 8 June 1933, No. D 297/32-48.

3 of the original] The heirs were instructed, within the meaning of Sec. 116 of the law on Non-Adversary Proceedings, concerning the significance of a conditional and an uncon-

ditional declaration of succession rights to the estate and then they declare that they are aware of the meaning of the unconditional declaration of succession rights made by them.

According to the last will of 19 May 1931, the decedent, Thomas Bata, has property in the amount of Kc. 57,262,131.— consisting of a claim upon Jan A. Bata. Because Jan A. Bata has settled this amount with the firm Bata a.s. in Zlin to the benefit of the test[ator], Thomas Bata, this property of Thomas Bata appears, as of the date of his death, as a claim against the firm of Bata a.s. in Zlin.

From this his claim the decedent has bequeathed:

1. to his wife Marie Bata the amount.... Kc. 8,100,000.—
2. to his son Thomas Bata..... Kc. 22,000,000.—
3. to his sister Anna Schiebel..... Kc. 1,500,000.—
4. to the Bata Aid Fund..... Kc. 21,500,000.—
5. to the City of Zlin..... Kc. 4,162,131.—

under conditions specified in detail in the last will of 19 May 1931.

The surv[iving] sister, Anna Schiebel, has filed a declaration on 18 June 1933, in which she retained for herself Kc. 100,000 from the total bequest made to her and the balance of Kc. 1,400,000 she renounces for the benefit of her children, to their legal and forced heirs, to wit: to Zdenka Hoza Kc. 500,000, to Anna Saller the amount of Kc. 500,000, and to Vladimir Schiebel the amount of Kc. 400,000 who have accepted in the above mentioned declaration these bequests, respectively, the renunciation of the bequest to their benefit.

The surv[iving] wife Marie Bata and the surv[iving] son Thomas Bata likewise accept the bequests made to them.

In the enumeration of his property made in the last will of 19 May 1931, the decedent has stated indefinitely the claim of the City of Zlin, using the word "approximately"; therefore the precise amount of the claim was ascertained

[p. 4 of the original]

by an inquiry to the firm Bata a.s. in Zlin, and appears to have been on the day of decedent's death Kc. 4,162.121, according to the letter of the said firm of 27 September 1932.

Thereupon, the heirs have stated in lieu of an oath the following

A. Property:

1./ claim upon the firm Bata, a.s. in Zlin in the amount of ..... Kc 57,262,131.—

2./ gold watch and other valuables ..... Kc. 5,000.—

[Translator's note: *The signs appear in the original and indicate that the text within the signs is to be repeated on p. 6 of the original, where the same signs again appear, with a reference back to this portion.]

3./ cash ..... Kc. 1,000.—

4./ clothes and linen ..... Kc. 5,000.—

Total property ..... Kc. 57,273,131.—

B. Debts:

There are none.

Thus the total property also forms the net estate.

Claims:

1./ Tax assessor's office in Kolin for arrears in taxes amounting to Kc. 27,054.90, according to the declaration of the claim of 5 November 1932, No. 791/32 of the said office and No. D 297/32-23. No. 1. 34 [of probate records]:

2./ Tax assessor's office in Holice for arrears in taxes amounting to Kc. 3,054.20, according to the declaration of the claim of 16 November 1932, No. 1245 of the said office and No. D 297/32-24 No. 1. 35 [of the probate records], and

3./ Tax assessor's office in Jihlava for arrears in taxes amounting to Kc. 5,310.25 according to the declaration of 26 Oct. [Oct]ober 1932, account no. 294 P.O., and of 22 December 1932, No. /33, of the probate records No. D 297/32-33 No. 1.33 and D 297/32-33 No. 1 54 are denied because:

the claim under 1./, consisting of arrears in taxes for the year 1930, inclusive, appears to be paid in view of the later regulations, and

the claims under 2./ and 3./ are claims against the firm T.S.A. Bata, as is evident from the declarations made, and not against the decedent Thomas Bata.

The parties move that the above mentioned claims be referred to the regular civil proceedings.

It is established that the claim of Ing. Jan Bazant for Kc. 100,000 ~~'ed~~ against the estate by his declaration of 2 August 1932, No. D 297/32-13 No. 1 22 was withdrawn by his declaration of 17 September 1932, No. D 297 32-16 No. 1.26.

The claim of the tax assessor's office in Napajedla of 5 October 1932, No. 2408 for arrears in taxes amounting to Kc. 6,551,399.55, was also withdrawn by the declaration of 20 June 1933, No. 1574, because in view of the definite regulations for the year 1931 the arrears appear to have been paid.

Thereupon, the participants present move for assignment of the estate in accordance with the law within the meaning of the test[ator's] last will of 19 May 1931, in the following manner:

A./ The following shall obtain:

1./ from the claim of the test[ator], Thomas Bata, against the firm of Bata,a.s. in Zlin:

p. 6 of the original]

1./ the surv[iving] wife Marie Bata the amount ..... Kc. 8,100,000

2./ the surv[iving] son Thomas Bata, the amount of ..... Kc. 22,000,000 provided that this property will be managed by his mother Marie Bata until he reaches 22. (twenty-

[Translator's note: *The sign on this page and the sign on p. 6 appear in the original to designate that portion of the record to be included in the judicial assignment of the estate.]

second) year of age, under condition that the proceeds shall be used for his education and the balance deposited for his benefit.

3./ the surv[iving] sister Anna Schiebel the amount of..... Kc. 100,000

4./ the surv[iving] niece Zdenka Hoza the amount of..... Kc. 500,000

5./ the surv[iving] niece Anna Saller the amount of..... Kc. 500,000

6./ the surv[iving] nephew Vladimir Schiebel the amount of..... Kc. 400,000

7./ the Bata Aid Fund with the seat in Zlin ..... Kc. 21,500,000

II./ The whole remainder of the estate, namely* <to be copied from the record above> in the amount Kc. 11,000 shall go to the surv[iving] spouse, Marie Bata, with 1/4, and the surv[iving] son, Thomas Bata, with 3/4, as joint property.

III./ Debts of the estate which may appear shall be paid by the surv[iving] spouse, Marie Bata, with 1/4, and by the surv[iving] son, Thomas Bata, with 3/4.

IV./ The inheritance taxes shall be paid by the heirs or legatees from their respective shares in the estate or bequests.>*

7 at the [illegible] Official communications shall be directed to Marie Bata, in Zlin, No. 292, at her request.

[Translator's notes: *See Translator's Note, *supra*, p. 4; **See Translator's note, *supra*, p. 5.]

The record was read, approved by those present, completed and signed with the understanding that the participants renounce any further written proceedings in the matter of this estate and move that all records in the case be submitted to the tax assessor's office, together with the list of properties forming the estate drawn by the Court

Commissioner in accordance with the present records, for the purpose of assessment of the inheritance taxes.

/Sgd./ Dr. Hugo Foerster
Notary as
Court Commissioner

/Sgd./ Marie Bata
/Sgd./ Thomas Bata

Official Note

After the conclusion of the hearing on the estate the Court received a communication from the Tax Assessor's Office in Kolin of 22 June 1933, No. 791/32, according to which that office has withdrawn its declaration of the claim for outstanding taxes of 5 November 1932, amounting to Kc. 27,054.90.

Therefore, it is no longer necessary to advise the Tax Assessor's Office in Kolin concerning denial of its claim by the heirs.

In Zlin, 26 June 1933

/Sgd./ Dr. Foerster
Notary
As Court Commissioner

(DEFENDANT'S EXHIBIT 92)

TRANSLATION

COPY

D. 257/32
56

June 26, 1933

as court commissioner

To the
BATA relief fund
Zlin.

Attention: Dr. Bohuslav Albert superintendent of the Bata hospital, president.

On July 12, 1932 Mr. Tomas Bata, industrialist in Zlin, died leaving a last will of May 19, 1931, which beside others had the following provision:

"I bequeath Kc. 21,500,000.— to my coworkers. This amount is to be paid to the Bata relief fund within 5 years with 5% interests and to be administrated in the sense of its valid by-laws."

As the court commissioner in the estate proceedings of the said decedent I am informing you herewith of it as well as of the fact that you have to receive this amount according to the deed of delivery out of a credit of the decedent, Mr. Tomas Bata against the firm Bata corporation in Zlin which I am advising at the same time.

Very truly yours:

notary public
as court commissioner

(DEFENDANT'S EXHIBIT 94)

TRANSLATION

COPY

D 297/32
57

June 26, 1933

as court commissioner

CITY OF ZLIN

On July 12, 1932 Mr. Tomas Bata, industrialist in Zlin, died leaving a last will of May 19, 1931 which beside others had the following provision:

"To the City of Zlin Mr. J.A. Bata will pay a debt of Kc. 4,300.000.— with Bata corporation."

In his list of his property in the last will the decedent mentioned this claim not exactly by the word "approximately" wherefor the claim has been established by inquiring the firm Bata corporation in Zlin as to its amount and the firm stated the amount as of the day of death of the decedent in the sum of Kc. 4,162,131.—

Since Mr. Jan A. Bata has settled this amount in an accounting made with the firm Bata corporation in Zlin among others in favor of the decedent, Mr. Tomas Bata, the City of Zlin will have to receive the amount of Kc. 4,162,131.— according to the deed of delivery hereof the credit of the decedent against the firm Bata corporation in Zlin.

As court commissioner in the estate proceedings of the said decedent I am informing you hereof and am advising also the firm Bata corporation in Zlin at the same time.

Very truly yours.

notary public
as court commissioner

(DEFENDANT'S EXHIBIT 84)

TRANSLATION

84

Copy

D 297/32
60

Order

Estate of Tomas Bata, industrialist in Zlin, deceased on July 12, 1932, leaving a last will and testament.

The statutory unconditional declaration of acceptance of the inheritance of the surviving spouse Marie Batova and of the surviving son Tomas Bata has been accepted by the court's order of June 8, 1933 index No. D 297/32-48

The statement in liue of oath listing the property will be the basis of winding up the estate.

According to it there are:

I assets	Kc 57.262.131.—
II debts of the estate	Kc ——
III The net estate is	Kc 57.262.131.—

The schedule of estate's assets is being forwarded to the revenue authorities for assessment of estate taxes.

District Court in Zlin, Department I.
June 28, 1933

Dr. Klenner

Copy to:
1/ Mrs. Marie Batova, Zlin no. 292
2/ notary public.

(DEFENDANT'S EXHIBIT 95)

Copy

Translation:

Reference number: D 297/32
59

Deed of delivery of estate

The court delivers the estate of Thomas Bata, manufacturer of Zlin, who died on the 12th day of July 1932 leaving a last will, according to law to the following heris, who have filed a declaration of heriship without claiming the benefit of inventory, to wit: to the decedent's wife, Marie Bata 1/4 and to the decedent's son, Thomas Bata 3/4 in view of the effectuated division of the estate according to which shall receive:

I./ from the amount owing to the decedent Thomas Bata from the firm Bata a.s. of Zlin:

1./ the decedent's wife Marie Bata, the amount ..... Kc 8,100,000.—

2./ the decedent's son Thomas Bata, the amount ..... Kc 22,000,000.— with the stipulation that this his property will be managed by his mother Marie Bata until he reaches the age of 22 (twenty-two) years, on condition that the yield be used for his education and the remainder deposited for his benefit.

3./ the decedent's sister Anna Schiebel, the amount ..... Kc. 100,000.—

4./ the decedent's niece Zdenka Hoza, the amount ..... Kc. 500,000.—

5./ the decedent's niece Anna Saller, the amount ..... Kc 500,000.—

6./ the decedent's nephew Vladimir Schiebel, an amount of..... Kc 400,000.—

7./ the Bata relief Fund of Zlin..... Kc 21,500,000.—

8./ the Town of Zlin..... Kc 4,162,131.—

II./ The whole remaining estate, to wit:

3./ gold watch and other valuables	Kc	5,000.—
3./ cash	Kc	1,000.—
4./ clothing and linen.....	Kc	5,000.—
total value	Kc	11,000.—

the decedent's wife Marie Bata shall receive in the proportion of ¼ and the decedent's son Thomas Bata in the proportion of ¾, as their joint property.

III./ Any debts of the estate will be paid by the decedent's wife Marie Bata in the proportion of ¼ and the decedent's son Thomas Bata in the proportion of ¾.

IV./ Estate duties will be paid by the heirs and legatees upon and out of their inheritance shares or legacies respectively.

District Court at Zlin, Part I.,
this 28th day of June, 1933.
Dr. Klenner, (own hand)

Seal of
Investigating Commission
of District National Committee
of Zlin.

This copy conforms with the original filed on file D 297/32
D.C. Zlin
Zlin. Decem. 13th, 1945

Illegible signature

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960 No.

JAN A BATA

Petitioner

v.

THOMAS J BATA; THOMAS J BATA and DAVID GRAHAM as Executors of the Estate of Mary T. Bata; and WESTERN INVESTMENT AND TRADING COMPANY LIMITED, a Bermuda Corporation

Respondents

APPENDIX C

To Petition for Writ of Certiorari

The New York Court of Appeals Opinion
Bata v Bata

The Supreme Court of the Netherlands Opinion
Bata v Bata

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APPENDIX C

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New York Court of Appeals

THOMAS J. BATA et al., Respondents, *v.* JAN A. BATA, Appellant, et al., Defendants.

Argued May 21, 1953; decided October 23, 1953.
[as reported in 306 N. Y. at 96]

Actions—replevin and equity—decedents' estates—Czechoslovak law—contracts—appeal—Court of Appeals—new findings and affirmance by Appellate Division—(1) action by decedent's widow and son to replevy stock certificates found in possession of safe-deposit company; latter and its depositor made no claim but interpleaded decedent's half brother who asserted ownership; action became one in equity between said widow and son and half brother; plaintiffs proved better right to certificates; judgment in their favor affirmed—(2) Appellate Division affirmed Special Term's findings that decedent did not make valid oral or written contract of sale to defendant; will, reciting such purported sale, did not dispose of such stock; decedent died intestate as to this stock—(3) Appellate Division affirmed judgment in favor of plaintiffs; weight of evidence as to new findings not before Court of Appeals—(4) plaintiffs not estopped—(5) evidence sustains finding that defendant never had possession under claim of right.

1. In this action by the widow and son of a Czechoslovak industrialist who died in 1932, as his heirs under the law of Czechoslovakia, to replevy bearer certificates for 826 shares in a Swiss holding corporation, the New York safe-deposit company in whose possession the certificates were found was permitted to withdraw from the action, the administrator of the person in whose safe-deposit box certificates had been deposited made no claim to them, an interpleaded Swiss partnership neither claimed the shares nor appeared in the action, and only de-

cedent's half brother, who had been one of his chief assistants, and who was interpleaded, claimed the certificates as against plaintiffs. Thus the action became one in equity between plaintiffs and defendant claimant. In such action, plaintiffs have established the better right to the certificates and judgment in their favor should be affirmed.

2. On the death of the industrialist in 1932, there were found in his safe a paper signed by decedent only, which his half brother asserted was a memorandum of an oral sale to said defendant half brother of almost all of decedent's assets, and a holographic will which recited that said half brother owed decedent the purchase price. Special Term, affirmed by the Appellate Division, found that there had been no oral or written sale, and no enforcible contract under Czech law, and that tax and probate proceedings in the Czech court had not resulted in any binding adjudication as to the validity of the so-called contract of sale. The will did not dispose of these shares of stock and, as to them, decedent died intestate, and they developed upon plaintiffs as his statutory heirs or "universal successors" under Czech law.

3. The court at Special Term found in favor of plaintiffs and that judgment was affirmed by the Appellate Division. However, some of the findings of Special Term were reversed and the Appellate Division made some contrary findings and additional findings. In view of the affirmance of the judgment, the weight of the evidence is not before the Court of Appeals. The only question presented is whether there is evidence to sustain the unreversed findings of Special Term, the findings made by the Appellate Division and the disposition based thereon.

4. The Appellate Division found that plaintiffs were not estopped by their conduct from claiming the certificates. The question is one of fact and, in view of the

affirmance of the judgment, the finding may not be disturbed.

5. Similarly, it cannot be said, as a matter of law, that there is no basis for the finding by the Appellate Division that the evidence failed to establish that defendant ever had actual or constructive possession of the certificates under claim of right.

Bata v. *Bata*, 279 App. Div. 182, affirmed.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 17, 1952, affirming, by a divided court, a judgment of the Supreme Court in favor of plaintiffs, entered in New York County upon a decision of the court on a trial at Special Term (SCHREIBER, J.). Stated findings of fact contained in the decision of Special Term were reversed and new findings made by the Appellate Division in lieu thereof.

Henry Cohen, *Rudolf B. Schlesinger*, *Jonathan B. Bingham* and *Beate Bloch* for appellant. I. The new finding below that Thomas Bata's intentions as expressed in his will and memorandum of sale were sham, and the documents intended to be fiction", is erroneous as a matter of law. (*Chisholm* v. *Commissioner of Internal Revenue*, 79 F. 2d 14; *Sawtell* v. *Commissioner of Internal Revenue*, 82 F. 2d 221; *Johnson* v. *Commissioner of Internal Revenue*, 86 F. 2d 710; *Matter of Kennedy*, 159 Mich. 548; *Matter of Smith*, 308 Mich. 518; *Fleming* v. *Morrison*, 187 Mass. 120; *Lister* v. *Smith*, 3 Sw. & Tr. 282; *Wright* v. *Delafield*, 25 N. Y. 266; *Ga Nun* v. *Palmer*, 216 N. Y. 603; *Cudney* v. *Cudney*, 68 N. Y. 148.) II. Thomas Bata's wishes as expressed in his will and in the accompanying memorandum of sale should be given effect. (*Matter of Fowles*, 222 N. Y. 222; *Matter of Rausch*, 258 N. Y. 327; *Bizzey* v. *Flight*, [1876] L. R. 3 Ch. D. 269; *Matter of Dimmitt*, 141 Neb. 413; *Arrington* v. *Brown*,

235 Ala. 196; *Jennings* v. *Reeson*, 200 Mich. 559; *White* v. *Reading*, 293 Mo. 347; *Woods* v. *Gilson*, 178 Mass. 511; *Loring* v. *Sumner*, 23 Pick. 98 [Mass.]; *Reynolds* v. *Reynolds*, 224 N. Y. 429.) III. Marie Bata and Thomas Bata are barred from asserting any rights to Thomas Bata's business property. (*Schloss Bros. & Co.* v. *Bennett*, 260 N. Y. 243; *Lieberman* v. *Templar Motor Co.*, 236 N. Y. 139; *Duke of Leeds* v. *Lord Amherst*, 2 Phillips 117, 41 Eng. Rep. 886; *Close* v. *Glenwood Cemetery*, 107 U. S. 466; *Turner* v. *American Metal Co.*, 268 App. Div. 239, 295 N. Y. 822; *Rothschild* v. *Title Guar. & Trust Co.*, 204 N. Y. 458; *Kent* v. *Quicksilver Mining Co.*, 78 N. Y. 159; *Pollitz* v. *Wabash R. R. Co.*, 207 N. Y. 113; *Chamberlain* v. *Chamberlain*, 43 N. Y. 424; *Lee* v. *Tower*, 124 N. Y. 370; *Beetson* v. *Stoops*, 186 N. Y. 456; *Smith* v. *Wait*, 4 Barb. 28; *Matter of Fowles*, 222 N. Y. 222.) IV. Marie Bata and Thomas Bata must be denied relief—even upon the finding below that a "fiction" was perpetrated. (*Burnet* v. *Brooks*, 288 U. S. 378; *First Nat. Bank of Boston* v. *Commissioner of Internal Revenue*, 63 F. 2d 685; *State of Colorado* v. *Harbeck*, 232 N. Y. 71; *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383; *Leonard* v. *Poole*, 114 N. Y. 371; *Holman* v. *Johnson*, 1 Cowp. 341, 98 Eng. Rep. 1120; *Kalman* v. *Kalman*, 275 App. Div. 715; *Carmine* v. *Murphy*, 285 N. Y. 413; *Flegenheimer* v. *Brogan*, 284 N. Y. 268; *Reiner* v. *North Amer. Newspaper Alliance*, 259 N. Y. 250.)

Inzer B. Wyatt, *Alfred Jaretzki, Jr.*, and *Robert MacCrate* for respondent. I. The Court of Appeals may not consider the new theory of a testamentary gift because the case was not tried on any such theory. (*Salisbury* v. *Howe*, 87 N. Y. 128; *United Press* v. *New York Press Co.*, 35 App. Div. 444, 164 N. Y. 406; *Caponigri* v. *Altieri*, 165 N. Y. 255; *Racine* v. *Morris*, 201 N. Y. 240; *Persky* v. *Bank of America Nat. Assn.*, 261 N. Y. 212; *Maloney* v. *Hearst Hotels Corp.*, 274 N. Y. 106.) II. The courts below correctly found title

in the heirs to the property in suit. III. Arguments of "laches", "acquiescence" and the like cannot defeat the legal title of respondents to these 826 Leader shares. (*Pollitz* v. *Wabash R. R. Co.*, 207 N. Y. 113; *United States* v. *Mack*, 295 U. S. 480; *Brant* v. *Virginia Coal & Iron Co.*, 93 U. S. 326; *Oklahoma* v. *Texas*, 268 U. S. 252; *Mayor of City of N. Y.* v. *Law*, 125 N. Y. 380; *Hatch* v. *Ferguson*, 57 F. 966, 68 F. 43; *Commissioner of Internal Revenue* v. *Burke*, 62 F. 2d 7.) IV. Respondents have committed no wrong which would forfeit their property. (*State of Colorado* v. *Harbeck*, 232 N. Y. 71; *Loughran* v. *Loughran*, 292 U. S. 216; *National Bank & Loan Co.* v. *Petrie*, 167 N. Y. 589, 189 U. S. 423; *Planters' Bank* v. *Union Bank*, 16 Wall. [U. S.] 483.) V. The documents do not contain any testamentary gift to appellant. (*Matter of Rausch*, 258 N. Y. 327; *Post* v. *Hover*, 33 N. Y. 593; *Bradhurst* v. *Field*, 135 N. Y. 564; *Dreyer* v. *Reisman*, 202 N. Y. 476; *Booth* v. *Baptist Church*, 126 N. Y. 215; *Matter of Bagot*, [1893], 3 Ch. 348; *Zimmerman* v. *Hafer*, 81 Md. 347; *Noble* v. *Tipton*, 219 Ill. 182; *Jennings* v. *Reeson*, 200 Mich. 559; *Allenbach* v. *Ridenour*, 51 Nev. 437.) VI. There is no "new finding" which is "without evidence to support it". VII. The new theory should not give appellant a new trial.

Froessel, J. We are confronted with an unfortunate family controversy between plaintiffs, the widow and only son of Thomas Bata, on the one hand, and defendant Jan Bata, Thomas' twenty-year younger half brother, on the other. Thomas Bata (hereinafter referred to as Thomas) was an unusually capable Czech industrialist, the ninth in line of a family of shoemakers, dating from the sixteenth century. Though born in humble circumstances, he emerged from obscure beginnings as a provincial shoemaker and created a huge industrial shoe empire which had its inception in the town of Zlin, Province of Moravia, Czechoslovakia.

By the year 1931, the Zlin factory was the largest in Europe, turning out 150,000 pairs of shoes a day and

equipped for the manufacture of 200,000 pairs daily; its shoes were sold on the continents of Europe, Asia, Africa and North America, including such countries as the United States, England, Iceland, most of the nations of Europe, the Near East, and a number of island possessions. According to the findings below, the value of Thomas's interest in this vast enterprise prior to his death was between thirty and forty million dollars. While in good health and actively at work further extending his operations into many parts of the world, he met his death at the age of fifty-six in the early morning of July 12, 1932, in an airplane accident at Zlin while en route to visit his son in the factory in Switzerland.

The present action was brought in May, 1947, by plaintiffs (hereinafter called Marie and Tom) to replevy from defendants Chase Safe Deposit Company and one Stewart O. Day, as administrator of the estate of Frank Muska, deceased, eight bearer certificates for 826 shares of Leader A. G., a Swiss corporation, reposing in a safe-deposit box rented by said Muska. The contents of the box had been undisturbed since Muska's death in 1942 because blocked under Federal executive orders. Jan Bata (hereinafter called Jan) also made claim to said certificates, as a result of which defendant Day interpleaded Jan as a defendant. Charles Jucker, Wilhelmine Meier and Hans Berger, constituting a Swiss consortium (or partnership), were also interpleaded. Their interest, as will hereinafter appear, is not proprietary and they have neither claimed the shares nor appeared in this action. Nor did defendant Day make any claim to the shares. Defendant Chase Safe Deposit Company was allowed to withdraw from the action. Thus the opposing claimants were Marie and Tom on the one hand and Jan on the other. In such a situation, the action became one in equity wherein the opposing claimants "were brought together to litigate the question which of them had the better right" to the securities in controversy (*Clark* v. *Mosher*, 107, N. Y. 118, 122).

The 826 Leader shares, which are all that is actually involved in this suit, represent, according to the original issue of 2,000 shares, about a 41% interest in the corporation, which is the top holding company in the Bata enterprises. Marie and Tom claim the shares as statutory heirs, or, in civil law, the "universal successors", of Thomas. Jan's claim has varied. He first asserted an oral contract with Thomas, as to which the courts below have decided adversely to him, and we are of course bound by such findings. He then claims that by virtue of two documents—an alleged written contract dated May 10, 1931, and an alleged will dated May 19, 1931—as well as the subsequent conduct of plaintiffs, he is now the owner of said shares.

Special Term found in favor of plaintiffs, and the judgment was affirmed by the Appellate Division, the latter court dividing sharply, however. The affirmance was not upon the same theory as adopted in the findings of Special Term, and some of such findings were specifically reversed. Special Term found for plaintiffs upon the theory that Jan had defrauded them into the belief that he was owner of these shares and all other Bata business property, by virtue of a sale of the same to him. The Appellate Division based its affirmance upon the findings of Special Term, except those with respect to plaintiffs' lack of knowledge of certain facts and Jan's fraud committed prior to 1939, a critical year in their relationship. In these respects it made contrary findings and additional findings of its own to which we will refer later. The dissenters in the Appellate Division voted to dismiss the complaint and granted relief to neither party, thus permitting the shares to remain with the Chase Safe Deposit Company.

At the outset, we should point out that the weight of the evidence is not before us, in view of the affirmance of the judgment (*Matter of Kaplan [Greenman]*, 294 N. Y. 584). Those Special Term findings reversed by the Appellate Division are therefore out of the case, and appellant concedes that the only real question here presented is

whether or not there is evidence to sustain the unreversed Special Term findings, the findings made by the Appellate Division and the disposition based thereon.

As already noted, Thomas Bata was an industrial genius. He converted the country town of Zlin into a large industrial center. In the year 1931 the Zlin company in *Czechoslovakia*, of which he was then virtually the sole proprietor, was incorporated as Bata a. s., and later in the same year Leader A. G. was formed as top holding corporation of the *foreign companies*. Nevertheless, he continued to operate all of the companies according to his own concepts and as though he were the individual proprietor thereof.

His philosophy of management was rooted in his early experiences. The business was originally a partnership with his brother, Antonin, who died in 1908, and his sister, Anna; yet, even among them as partners, he had insisted upon the "single head" principle. An additional insight into his attitude toward the business which was his life's work may be found in the "moral testament" which was found with his last will. It was written in 1919, and declares to his successors: "The first condition for the prosperity of our factory and, therefore, also for the preservation of the property invested in it is, that you should not think the factory is only yours and only for you. * * * as soon as you will think only of yourselves, as soon as you cease to serve with your factory the commonwealth you will become superfluous and you will fall inevitably."

This admonition was undoubtedly written with Thomas's earlier will of 1918 in mind, though it was preserved and kept with the later will. Under the 1918 will, Tom would have succeeded to *50%* of the business, but only after a period during which *control* would be exercised by others, under careful restrictions specifically set forth.

In Thomas Bata's business there were no titles. He was called "Chief" and he had three top assistants—Cipera, Muska and Jan. Cipera was Thomas's chief executive assistant, acting as his second in command. He was also chief fiscal officer. He entered the organization in 1919. Muska was "general financial adviser" to the Bata companies, and was the author of the plan of interlocking companies of which Leader was at the top. He was recognized as Thomas's "attorney in fact and confidential man." Jan had commenced working for Thomas at the age of fourteen and had a thorough training in the business. He acted as a sort of "trouble shooter," particularly as to new construction outside of Czechoslovakia.

We have already mentioned the incorporation of Leader A. G. in 1931. That was part of an attempt to put the enterprise in order from an organizational point of view, as well as to protect the increasing foreign interests in the uncertain political setting of the times. It was organized by a Swiss attorney, Dr. Wettstein, and Leader is a Swiss corporation. One of the dominant purposes behind the organization of Leader was *concealment* of Thomas's ownership of the foreign companies, as was found by the lower courts. Transactions were conducted in such a way that it appeared that Thomas had loaned Wettstein and his partners a sum of money, for which Leader shares had been pledged to Thomas as security. Thomas was protected by rights to purchase the shares for the amount of the debt", and by the agreement of Wettstein and the other members of the consortium to carry out his orders in connection with the operation of Leader.

Leader took over majority ownership in the foreign companies, and Thomas retained minority interests therein. The same was done with the shares of companies thereafter organized. Physical possession of 1,996 Leader shares (of which the 826 shares in suit are a part) was taken by Thomas and retained by him, apparently in the

custody of Muska. Four qualifying shares were retained by Wettstein and his associates. Subject to the aforesaid arrangement between Thomas and Wettstein, very careful precautions were taken that the management of Leader should have its legal *situs* in Switzerland.

On July 12, 1932, when Thomas died in the airplane crash, Tom was only seventeen years of age, but had already commenced his apprenticeship in the business and was then occupied at the Swiss factory. His mother was not a businesswoman, but concerned herself with its "social department." Thomas's relations with his wife and son were apparently of the best, and the trial court so found. The crash occurred early in the morning, almost immediately after the take-off from Zlin. Jan and Cipera rode back together from the scene of the tragedy, and discussed the future of the business. Later that day, the safe in Thomas's office was opened with a key which had been taken from his person. In that safe were found two documents. One of said documents was in an envelope addressed to Jan. After opening the envelope, the enclosed document was signed by those present and then dated by them; it bore its own date of May 10, 1931, was in Thomas's handwriting, and read:

"May 10, 1931

I, the undersigned Tomas Bata, sell to you J. A. Bata and you purchase from me all shares of Bata a.s. Zlin, and also all shares of the building company 'Zlin' also all shares of the company 'Tisk' and also participations of the Libstat establishments. Of foreign companies I sell you the following shares or participations.

[List follows*]

I sell to you further also shares of the domestic companies:

*The Leader shares were not mentioned in these lists.

[List follows*]

From these values the landed property of Loucka and Lazy is excluded, also my dwelling house in Zlin.

Except for these named values [four words crossed out] I sell to you all [misspelled word 'my' crossed out] my property whatsoever even if it is not named here for the amount of Kc. 50,000,000 fifty million Kc. in Czechoslovak currency.

This purchase price you are obligated to pay in cash within one year after taking over the companies and to pay 5% interest per annum.

Sgd. Tomas Bata

Further from the sold property the debt which we have against the City of about 4,300,000 is excluded, that is to say, by this amount the purchase price is increased and J. A. Bata is obligated to pay this amount to the City of Zlin.

Sgd. Tomas Bata"

The trial court found that Jan appeared surprised when he read the paper. Dr. Foerster, a notary then present, commented to the effect that if the paper was a contract, it shoul' be signed by both parties. Jan then stated that that could be done and he accordingly inscribed the words: "I agree and purchase," with his signature. On the following day Jan amended his written addendum, placing above it the date, July 13, 1932, and adding: "respectively, I agree*d* and purchase*d* per oral agreement" (emphasis supplied). The original document was turned over to the notary for filing in his official registry. On July 18th, Jan sent a copy of the document to the tax authorities with a letter in which he erroneously stated that he had received it from Cipera on July 13th. Jan testified that the paper was in effect a memorandum of an oral agreement of sale which he had made with

Thomas. Special Term rejected that testimony and indeed found Jan "wholly unworthy of belief." The Appellate Division also found that there had been no actual sale, oral or written.

The other document found in the safe was also in the handwriting of Thomas, and was his last will, dated May 19, 1931. In accordance with Czech law, it was opened on July 13th and read to the heirs. At the same time the moral testament and two prior wills were read. The last will read as follows:

"My last will!

Made on the day 19/5 1931.

My property as of today consists of		
A claim against J. A. Bata for all shares in domestic and foreign companies sold	Ke.	50,000,000
My dwelling house in Zlin		100,000
Landed Estates Loucka and Lazy and Schmegerle		3,000,000
Claim against the City of Zlin—approximately		4,300,000
		57,400,000
From this my property I bequeath		
To my wife Mrs. Marie Bata the landed estates Loucka Lazy Schmegerle		3,100,000
Further in cash	Ke.	5,000,000
To my son Tomas Bata his legitimate quota	Ke.	22,000,000
with the stipulation that this property of his shall be administered by his mother until he attains 22 years of age. The proceeds shall be used for his education and the remainder shall be deposited for his benefit.		
		30,100,000

Carried forward	30,100,000
To my sister Anna Schiebel, I bequeath	1,500,000
To the City of Zlin the debt with Bata a.s. will be paid by J. A. Bata	4,300,000
The balance	Kc. 21,500,000
	57,400,000

I give to my fellow-workers

This amount [crossed out: 'is payable'] is to be paid within 5 years with 5% interest [crossed out: 'to be paid in cash'] to the Bata Workers Aid Fund and shall be administered in the spirit of the by-laws now in force.

It is understood that I have drawn up this last will while in full possession of my mental powers, clear minded and without duress and in my own hand.

/Sgd. Tomas Báta

My previous testament is thereby naturally deprived of its validity.

Sgd. Tomas Bata."

Both lower courts have found that neither the May 10th writing nor the will constituted a valid, enforcible contract under Czech law. Although we are bound by such findings, it is interesting to note that in the settlement of the *estate* inheritance taxes, only its alleged claim against Jan under the May 10th writing was taxed, but these taxes were actually paid by Bata a.s. and not by Marie and Tom. As to the business property, Jan claimed ownership pursuant to an oral contract, which would not have been subject to any tax. The tax officials rejected this contention, but in effect treated the sale as a written contract, subject to a 2% tax. Upon this basis, a compromise assessment of the business property was made and the 2% tax paid. The assessment was approximately

274,500,000 crowns, or $8,235,000, considerably less than the thirty to forty million dollars found by Special Term to be the worth of the properties at the time of Thomas's death. Had this all been deemed Thomas's estate, the tax would have been enormous, beginning at 20%.

During the year following Thomas's death, the estate went through the civil law equivalent of our probate proceeding. In Czechoslovakia, such a proceeding is nonadversary. Marie and Tom took as statutory heirs, since the will contained only specific bequests. After he reached the age of eighteen, Tom was declared of age. He and Marie thereafter accepted the estate unconditionally, under which form of acceptance the heirs accept full liability for the decedent's obligations, with the result that there need be no further judicial proceedings in relation to the estate, nor a court inventory. When the court delivers the estate to the heirs, they take title to *all* property of the decedent, whether known or *unknown*, subject to legacies and debts, as there is no administrator or executor in their civil law.

Since the written contract of May 10, 1931, was held invalid by the courts below under the Czech law, the estate had no legal claim against Jan. And, although the holographic will was valid under Czech law, yet, since it disposed of a nonexisting asset only, Thomas Bata's estate devolved according to law to his widow and son by way of intestacy. It follows that, subject to the payment of debts and legacies, plaintiffs became the owners of Thomas's estate as a matter of law. The only remaining question is whether the Leader shares in suit were transferred to Jan by any acts of Marie and Tom thereafter.

Section 380 of chapter 3 of Part 2 of the General Civil Code of Czechoslovakia provides: "No ownership can be acquired without a legal basis and without a legal method of acquisition." The evidence is clear that no transfer or assignment of those shares was made by Marie and Tom to Jan. It is claimed however that they passed

by estoppel as part of a thirty- or forty-million-dollar estate.

Much of the voluminous evidence in this case related to this claim. It will serve no useful purpose to review it in detail. Suffice it to say that there was evidence in the nature of acknowledgments by Marie and Tom tending to support the claim. As to the tax and probate proceedings in the Czech court, however, the courts below have found that they did not result in any binding adjudication as to the validity of the so-called written contract of sale of May 10, 1931, under Czech law. It is also true that Marie and Tom received interest on and installments of their so-called "legacies," but these came not from Jan personally, but out of their own inherited estate. Moreover, in some cases there is evidence of actual transfers or consents by Marie and Tom to Jan, as, for example, with respect to the British Bata shares, the New York shares, and the antedated agreements and joint wills with respect to the Bata a.s. shares prepared in the early days of the war when Jan asked Marie to return to Czechoslovakia to protect the Zlin factory from confiscation. The status of these securities, however, must be evaluated in their own setting. But there were no such transfers by Marie and Tom of the Leader shares in suit. Everyone concededly recognized Jan as the chief, including Marie and Tom, without question or inquiry until the year 1939, when Jan sought to discharge Tom for a trifling reason.

On the other hand, in 1940, when Jan was on the British blacklist, he told William Jephcott, associated with Canada's Alien Property Custodian, that he had no knowledge of the ultimate beneficial ownership of said Leader shares. He testified that the following year, when he was placed on the American blacklist, and before his departure for Brazil, where he remained throughout the war, he gave the Leader shares in suit to Muska; but Muska made a formal declaration to the Federal Reserve Bank that he had received these shares from Jan to be held subject to instructions from Jucker (who claimed to know nothing

about the actual proprietary interest); that Jan told Muska that he had received them from Jucker for safekeeping; and that Jan had also told him that *he (Jan) had no personal proprietary interest therein.* Though he claimed to own the Bata shares which he transferred to Marie, he agreed to pay her $170,000 upon their return.

We find a hopeless conflict in the evidence with respect to the claimed estoppel. Whether or not upon this record Marie and Tom were estopped is clearly a question of fact. The Appellate Division had the right to determine as it did that the conduct of the parties did not alter the acual devolution of these shares, and that an equitable estoppel had not been established with respect to them. We may not disturb these findings.

We agree with the court below in its affirmance of the trial court's findings and with its reversal of the other stated findings of Special Term. Nor can we say as a matter of law that there is no basis for their finding "That the evidence fails to establish that Jan A. Bata ever had actual or constructive possession of the 826 Leader A. G. shares in suit under claim of right."

Inasmuch as, under the law of Czechoslovakia, Thomas's property devolved to his widow and son, and the Appellate Division has held that they were not estopped from claiming the Leader shares in suit by their conduct, we have no alternative but to affirm. Upon this record as it comes to us, Marie and Tom "had the better right" to the shares in suit (*Clark* v. *Mosher, supra*). We limit our decision, however, to these shares only.

The judgment of the Appellate Division should be affirmed, with costs.

Lewis, *Ch. J.*, Conway, Desmond and Dye, *JJ.*, concur with Froessel, *J.*; Fuld, *J.*, dissents and votes to reverse and dismiss the complaint for the reasons set forth in the opinion of the two dissenting Appellate Division Justices; Van Voorhis, *J.*, taking no part.

Judgement affirmed.

Dutch Supreme Court.

IN THE NAME OF THE QUEEN

THE SUPREME COURT OF THE NETHERLANDS, Chamber for Civil Affairs has pronounced the following decision:

The Supreme Court of the Netherlands, in the suit (No. 884) of: *Tomas Bat'a junior*, shoe manufacturer, residing at Zurich, in his own behalf as well as in his quality of executor under the laws in force in the Bermudas of the estate of Marie Mencik, widow of Tomás Bat'a, who in accordance with Czech custom called herself Marie Bat'ov'a, and had her last place of residence at Hamilton (Bermuda), and *David Henry Graham*, residing at Hamilton (Bermuda), in his quality of executor of the aforesaid estate, Plaintiffs in final appeal from the judgment pronounced between parties by the Court of Appeal of Amsterdam on December 23rd 1954, represented by Dr. D. J. Veegens, barrister to the Supreme Court,

VERSUS

1) *Jan A. Bata*, shoe manufacturer, residing at Batatuba in the State of Sao Paolo of the United States of Brazil, defendant in final appeal, represented by Dr. J. Kist, barrister to the Supreme Court,

2) the *Nederlands Beheersinstituut* (Netherlands Custodian Office) established at The Hague, administrators under the Decree Enemy Property of the property of defendants sub 1, co-defendants in final appeal, represented by Dr. C. R. C. Wijckerheld Bisdom, barrister to the Supreme Court,

3) the limited liability company *Amsterdamsche Bank N.V.*, established at Amsterdam, co-defendants in final appeal, in default of appearance,

4) the limited liability company *N.V. Nederlandsche Schoen-en Lederfabrieken Bata-Best*, established at Best, co-defendants in final appeal, in default of appearance;

Having heard plaintiffs in final appeal, the co-defendant Jan Bata and the co-defendants sub 2;

Having heard the Solicitor-General Loeff on behalf of the Attorney-General in his statement moving to disallow the appeal where it is directed against the co-defendants sub 2, further to reject the appeal and to condemn plaintiffs in the costs incurred thereon;

Having examined the documents;

Whereas it appears from the disputed judgment:

that Marie Mencik mentioned hereinbefore and the plaintiff Tomás Bat'a junior (Tom) mentioned sub 1, after having caused a revindicatory attachment to be made in virtue of a permission granted by the President of the District Court of Amsterdam on a scrip certificate for 202 new shares, numbered 1701-1900 and 1999-2000 in the limited liability company Nederlandsche Schoen-en Lederfabrieken Bata-Best, which scrip was in the custody of the Amsterdamsche Bank, requested the District Court by introductory summons to declare the said attachment valid, and furthermore:

A. to condemn the Amsterdamsche Bank to surrender the aforesaid scrip to them;

B. to condemn Bata-Best to pay them an amount of ƒ 44,336.—;

C. to condemn Jan Bata to tolerate and allow all this;

that the grounds on which plaintiffs based these claims were summarized by the Court of Appeal as follows:

On July 12th 1932 Thomas Bata senior, the husband of Marie Bata and the father of Tom Bata lost his life in a flying accident. Thomas Bata senior, who was of Czecho-

slovak nationality and lived in Czechoslovakia, had instituted no heirs in his last will and testament. According to the provisions of Czechoslovak law applicable in this matter, the appellants were his legal heirs, to wit Marie Bata as to one/fourth portion and Tom Bata as to three/fourths and, as a result of the legal transfer ("Einantwortung") effected before the Cantonal Court at Zlin (Czechoslovakia) on June 28th, 1933, his wife and his son had become owners in the aforesaid proportion of all assets of Thomas Bata's estate. To this estate belong 225 shares of f. 1.000.-, numbered 6-10, 81-100, and 301-500 in Bata-Best, which, when the estate devolved, was called "N.V. Maatschappij voor Schoen-en Lederindustrie" and was then established at Amsterdam. Thus the testator's wife and son are owners of the said shares.

Jan Bata, a half-brother of Thomas Bata Senior, took the share certificates of the aforesaid shares into his keeping after Thomas Bata Senior's death, and has since then acted as the lawful owner of those shares. He invokes a purchase contract allegedly made between himself and Thomas Bata Senior, and has given testator's wife and son the impression, that, as long as Tom Bata was too young to take control of his father's business, he, Jan, would take care of the interests of the testator's wife and son as a kind of stadtholder or trustee.

In virtue of a resolution of the meeting of shareholders of May 12th 1942 Bata-Best issued new shares, 450 of which were issued to the then shareholders in proportion to their holdings, so that 202 shares fell to the holder of the aforementioned 225 shares, and 248 shares to the Swiss company Leader A.G. as holder of 275 shares.

However, as Bata-Best did not know and, in consequence of the war, could not ascertain whether the aforesaid 225 shares were still in Jan Bata's possession, Bata-Best deposited the scrip certificates for the said 202 new shares numbered 1701-1900 and 1999-2000 in the company with the Amsterdamsche Bank for the holder of the shares

numbers 6-10, 81-100, and 301-500, which holder was at that moment unknown.

After Jan Bata had proved, in 1949, himself to be the holder of the aforesaid 225 shares, the Amsterdamsche Bank transferred the 202 shares to a share deposit account to the name of Jan Bata, on or about June 3rd, 1949. However, as these 202 shares belong to the real owners of the 225 shares numbers 6-10, 81-100 and 301-500, testator's wife and son are also owners of the aforesaid 202 shares and they are entitled to demand that the Amsterdamsche Bank surrenders to them the 202 new shares and to demand from Jan Bata, that he tolerates and permits this surrender.

Furthermore, Bata-Best declared a dividend of 4% on the shares for each of the financed years 1940, 1941, 1942 and 1943, but have so far left these dividends unpaid, because the holder of the 225 (and, since the extension of the capital: of the 225 plus 202=427) shares could not be reached owing to the circumstances of the war. This dividend, amounting in total to f. 52.160.—, less 15% dividend tax, f. 44.336.—therefore belongs to testator's wife and son as the real owners of those shares, so that they are entitled to claim this sum of f. 44.336.—from Bata-Best and to demand from Jan Bata that he tolerates and permits the payment of this sum to them.

that the Amsterdamsche Bank acknowledged by statement of reply that in 1942 Bata-Best had deposited with the Bank a scrip certificate for 202 new shares in Bata-Best numbered 1701-1900 and 1999-2000 for the then unknown holder of the shares 6-10, 81-100 and 301-500 and that, after Jan Bata in 1949 had proved himself to be the holder of the latter shares, the Bank had transferred this scrip certificate on or about June 3rd 1949 to a share deposit account to the name of Jan Bata. Bata-Best on their part acknowledged that, in virtue of a resolution of the company's general meeting of shareholders, the company had issued new shares and that 202 of these new shares had

been issued to the holder of the 225 shares numbered 6-10, 81-100 and 301-500. The company also acknowledged that on the aforesaid 225 and 202 shares an amount of *f* 44,336.— was still outstanding for dividends in respect of the financial years 1940, 1941, 1942 and 1943;

that both the Amsterdamsche Bank and Bata-Best declared themselves willing to hand over the aforesaid scrip certificate and the aforesaid sum of *f* 44,336.— respectively to the party that would appear to be entitled thereto on the ground of a final and conclusive judgment, on which ground they both referred to the decision of the Court;

that Jan Bata however disputed the claim by statement of reply. He acknowledged that Tomas Bata senior lost his life in an airplane crash on July 12th 1932, that Marie Bata was his widow and Tom Bata his son, and that Tomas Bata senior lived in Czechoslovakia and was of Czechoslovak nationality;

that he put forward, however, that about May 1931 he had bought amongst other things the old 225 shares in Bata-Best from Tomas Bata senior and that he had done this as an independent person and not as a stadtholder or trustee for testator's wife and son, which had been laid down by Tomas Bata senior in a document of May 10th 1931 and that Tomas Bata senior had further made a completely holographic testament on May 19th 1931, in which, on basis of a statement of capital based on this sale, he had left to Marie Bata three country estates and an amount of 5,000,000 Cz. Crowns in cash and to Tom Bata his legal portion of 22,000,000 Cz. Crowns in cash, but that the old shares Bata-Best included in the aforesaid purchase had not been left to either of the appellants; he furthermore put forward that after the death of Tomas Bata senior he had i.a. obtained the ownership of the aforesaid 225 shares in Bata-Best as a result of delivery, and had paid the purchase amount due by him to testator's wife and son in the portions due to them by crediting their accounts with the parent company Bata A.S. Zlin;

that, furthermore, it was his opinion that testator's wife and son had in any case forfeited all their (alleged) rights to these shares; alternatively he invoked prescription. As to the outstanding dividends that were being claimed, he put forward that they were due to him as owner and alternatively as "redlicher Besitzer" in the sense of article 330 of the Austrian Civil Code in force in Czechoslovakia, hereinafter to be called A.B.G.B.;

that in his rejoinder Jan Bata observed that it had been Tomas Bata senior's intention that he was to succeed him after his death as highest leader and chief of the Bata concern and that he was to become the owner thereof and that, with a view to this, it was Tomas Bata senior's wish that the shares of the concern, so far as they belonged to him in ownership, should go to Jan Bata in the form of a purchase contract, because bequeathing these shares by will or legacy would be too expensive because of the death duties;

that by judgment of April 28th 1953 the District Court denied the plaintiffs their claims and declared the attachment laid to be null and void;

that, with reference to the appeal lodged against this judgment by Tomas Bata's heirs, the Court of Appeal took the following grounds in the disputed judgment:

"As to the Law:

A. Survey of established facts.

(1) The District Court begins its judgment by recording that the facts enumerated hereinafter in the legal grounds 2-24 are admitted between Tomas Bata's heirs on the one part and Jan Bata on the other part.

(2) On July 12th 1932 the captain of industry Tomas Bata lost his life in an airplane crash. He was the founder and leader of the well-known, widespread, international Bata shoe concern, as such i.a. general manager of the parent company of the concern, the firm of Bata A.S. Zlin

(Czechoslovakia). Tomas Bata, who held practically all the shares of the concern either directly or indirectly, lived at Zlin and was of Czechoslovak nationality.

(3) Marie and Tom Bata—the latter was 17 years old at the time of Tomas Bata's death—are his widow and his only child respectively. Jan Bata, who was already employed as manager in the concern before Tomas Bata died, is his half-brother.

(4) After the announcement of Tomas Bata's death, on the very same day, July 12th 1932, his "right hand", the Bata A.S. manager with power of attorney Dominik Cipera, in the presence at any rate of Jan Bata, the manager Vavrecka, the lawyer Dr. A. Mencik (Marie Bata's brother) not employed with the Bata concern and living elsewhere, and the notary Foerster, opened the safe of the deceased in the latter's private office with the key of that safe, which had been found on the body. Amongst other papers, two closed envelopes were found. On one of these envelopes was written: "John Bata", on the other "My last will".

(5) The first envelope was opened by Jan Bata in the presence of the other persons mentioned above, and it appeared that it contained a document entirely written by hand and signed by Tomas Bata, reading as follows (in translation), as far as it is of importance here:

"10.5.1931.

"I the undersigned Tomas Bata sell to you J. A. Bata, and "you buy from me all the shares in Bata A.S. Zlin, as well "as all the shares in the Company Tisk etc. Of the foreign "companies I sell to you the following shares," etc. (fol- "lows an enumeration of foreign companies, including Bata "Maatschappij Amsterdam 51,000 guilders", and the "document ends:) "Excluded from these assets are the "large country estate Loucky and Lazy as well as my

"house at Zlin. Apart from the above-mentioned assets I "sell you my whole property, even if it is not enumerated "here, for the amount of Kc. 50,000,000.— fifty million Kč. "Czechoslovak currency. You shall pay this purchase price "in cash within one year after taking over the company, "increased by 5% interest per annum.

" signed: Tomas Bata.

"Furthermore, the debt which we have to the municipality "of Zlin to the amount of approximately 4,300,000 is "excluded from the property sold; that is to say, the "purchase price is increased by this amount and J. A. "Bata has the obligation to pay this amount to the city "of Zlin.

" signed: Tomas Bata.

(6) After Jan Bata had read this document, the other persons present also read its contents. In connection with a remark then made by the notary, in which he expressed his doubt as to the legal validity of the document, seeing that it had not been signed by both parties, Jan Bata wrote at the foot thereof, in the presence of the others: (in translation): "I consent and buy", behind which words he placed his signature. The next day, not at any rate on the same day, he wrote under the words just mentioned, (after perusal of the last will, at the notary's advice?), (in translation): "respectively, I have consented and bought by verbal agreement". The date "13-7-32" was written over these additions (the photostatic copies Def. Exh. CN-1 create the impression that this date was originally "12-7-32").

(7) The delivery of the shares referred to in the said document, the actual value of which was a multiple of 50,000,000 Kc., had not yet taken place at the time of Tomas Bata's death.

(8) The envelope which, according to its superscription, contained the last will of Tomas Bata, was opened

by the probate judge on July 13th 1932 in accordance with the Czech legal provisions. It appeared that the contents consisted of a document entirely written and signed by Tomas Bata in his own hand, reading as follows (in translation):

"My last will:
"Drawn up on 19/5 1931.
"My property as at this day consists of:

"The claim on J. A. Bata in respect of all the shares sold	
"in the home and foreign	Kc. 50,000,000.—
"My house at Zlin	Kc. 100,000.—
"The big country estates Loucka and	
" Lazy and Schmegerle	Kc. 3,000,000.—
"The claim with the city of Zlin, appr.	Kc. 4,300,000.—
"	Kc. 57,400,000.—

"Of this property I bequeath to my wife
"Mrs. Marie Batova the big country
"estates Loucka Lazy Schmegerle Kc. 3,100,000.—
"Furthermore in cash Kc. 5,000,000.—
"To my son Tom Bata the legal portion Kc. 22,000,000.—
"with the proviso that his mother shall
"administer this capital for him till the
"completion of his 22nd year of age. The
"returns thereon shall be used for his
"education and the rest shall be invested
"in his favour.
"To my sister Anna Schieblova I bequeath
"bequeath Kc. 1,500,000.—
"J. A. Bata shall pay to the municipality
"of Zlin the debt of Bata A.S. Kc. 4,300,000.—
"The balance of Kc. 21,500,000.—
"I allot to my fellow-workers.
" Kc. 57.400,000.—

"This amount, increased by 5% interest, shall be paid to "the Bata provident fund in the course of 5 years, and it

"shall be administered in the spirit of the articles of "association now in force.
"Needless to say that I have written this last will in "full consciousness, in full possession of my intellectual "faculties, free from duress and by my own hand.
"signed Tomas Bata.

"My former last will hereby loses all its force in any case.
"signed Tomas Bata."

(9) On July 13th 1932 the probate judge read out this document at the widow's house, as well as two wills of older date (the latter of 1918) and an undated "memorandum to my will" written by testator (possibly before 1931), referred to by parties as the "moral testament". When the wills were read out, Marie and Tom Bata were at any rate present besides the notary and Cipera.

(10) The previous day Tom Bata had come over from Switzerland to Zlin after receipt of the news of his father's death.

(11) After Tom had been declared of age by emancipation on September 21st 1932, the legal winding-up of the estate took place in accordance with the formal provisions of the old Austrian "Kaiserliches Patent" of August 9th 1854 on "the procedure in legal matters other than disputes", applicable according to Czech law. Under Czech law the material law of the (Austrian) General Civil Code ("Allgemeine Bürgerliche Gesetzbuch", hereinafter referred to as A.B.G.B.) was applicable.

(12) Marie and Tom Bata came in as heirs in this winding-up and, after having made a statement of unconditional acceptance of the estate, were accepted by the Court as (sole) heirs by law, the former for ¼ and the latter for ¾ of the estate. As is apparent from an official record of June 23rd 1933 produced by them in translation, they declared in the proceedings referred to that

they recognized the last will of May 19th 1931 with its additions as being a correct and valid codicil.

(13) As is to be assumed, also in connection with the circumstance that the immovable goods mentioned in the last will stood in the name of Bata A.S. and therefore formed no part of the estate, (and taking into consideration that the claim of the city of Zlin had turned out to amount to Kc. 4,162,131.—), the aforementioned official record of June 23rd 1933 signed by Marie and Tom Bata further states inter alia (in translation):

"According to the last will of May 19th 1931 testator
"Tomas Bata has a property amounting to Kc. 57,262.-
"131.—, consisting of a claim on Jan A. Bata.
"As Jan A. Bata settled this amount with the firm of Bata
"A.S. Zlin in favor of testator Tomas Bata, this property
"of Tomas Bata on the day of his death appears as a
"claim on the firm of Bata A.S. Zlin.
"Of this claim, testator bequeathed:
"1) to his wife Marie Batova an amount
"of Kc. 8,100,000.—
"2) to his son Tomas Bata Kc. 22,000,000.—
"3) etc."

whilst it is further clear from the said report that, according to "Eidesstattliche Erklärung" (statement in lieu of oath) made by Marie and Tom Bata, the estate only consisted of some objects of value, cash and clothing to a total amount of Kc. 11,000.—, besides the aforementioned claim of Kc. 57,262,131.—.

(14) Finally the legal transfer of the estate "Einantwortung") was made to Marie and Tom Bata as heirs on June 28th 1933, with due observance of the above.

(15) Marie and Tom Bata were credited in the books of Bata A.S. with the aforementioned amounts of Kc. 8,100,000.— and Kc. 22,000,000.— respectively, and interest on these amounts at the rate of 10% per annum was

added. They regularly received statements of account. In the course of the years they drew sums several times from their credit balances.

(16) From the death of Tomas Bata, Jan Bata took his place in the Bata concern, without his position as lord and master of the concern being questioned by Marie and Tom Bata, who both continued to work in the business, the former as social welfare officer, the latter in training in various functions. Marie and Tom on the one hand and Jan Bata on the other maintained the most cordial relations. They often saw each other.

(17) In their quality of heirs, Marie and Tom still gave their coöperation on July 12th 1933 and August 20th 1934 to the transfer to Jan Bata's name of the shares registered in testator's name in the "Bata Shoe Co., New York" and the "Oesterreichische Bata Schuh Gesellshaft m.b.H.", both belonging to the Bata concern.

(18) Because of the German occupation of Czechoslovakia Marie and Tom took refuge in Canada and Jan in Brazil; at the end of 1939 Marie returned to Czechoslovakia at Jan's request, in order to guard the interest of the concern there as far as possible.

(19) In 1939 disagreement arose between Jan and Tom, with the result that Jan dismissed Tom as managing director of the Canadian Bata business. This dismissal was subsequently withdrawn, after Tom had offered his apologies.

(20) Not until after the war, in 1945, did Marie and Tom Bata actually dispute Jan's ownership of the Bata concern and did they take the standpoint that they, being Tomas Bata's heirs, have title to the shares of the companies belonging to the concern, for which reason they commenced legal proceedings against Jan in several countries.

(21) As regards the shares in N.V. Nederlandsche Schoen- en Lederfabrieken Bata-Best: at the foundation of

this limited liability company (then still called N.V. Maatschappij voor Schoen- en Lederindustrie Bata) Tomas Bata received 51 bearer shares of *f* 1,000.— in this company, mentioned in the "contract of sale" of May 10th 1931 referred to hereinbefore. Shortly thereafter new shares were issued, of which Tomas obtained 174, so that he then held a total of 225 bearer shares of *f* 1,000.— (the other shares of the company were in the hands of the Swiss company Leader A.G., a holding company of the concern). After Tomas Bata's death the said 225 shares passed into the hands of Jan Bata and were still in his possession at the commencement of this action.

os. 6-10, 100 and -500)

(22) In 1942 the N.V. Nederlandsche Schoen- en Lederfabrieken Bata-Best proceeded to the issue of new shares, 202 of which came at the disposal of the holder of the above 225 old shares. Seeing that, owing to the state of war, the said limited liability company did not know and was unable to ascertain whether the 225 shares were still in the hands of Jan Bata, they deposited the scrip certificate for the 202 new shares (Nos. 1701-1900 and 1999-2000) with the N.V. Amsterdamsche Bank in behalf of the holder of the 225 shares referred to.

(23) After Jan Bata had proved in 1949 to be the holder of the 225 shares concerned, the Bank transferred the scrip certificate for the 202 new shares to a share deposit account in his name.

(24) Both on the 225 old shares and (since the extension of capital in 1942) on the 202 new shares the N.V. Nederlandsche Schoen- en Lederfabrieken Bata-Best declared a dividend of 4% for each of the financial years 1940 through 1943 to a total amount of *f* 44,336.— (after deduction of 15% dividend tax), which amount has so far remained unpaid.

(25) These were the factual grounds of the District Court, and the Court of Appeal fully agrees with this survey of established facts, the correctness of which has not been disputed by parties.

(26) Jan Bata did put forward in the appeal that the envelopes found in Tomas Bata's safe and containing the document of May 10th 1931 and Tomas Bata's last will of May 19th 1931 were not only closed but also sealed, and he also put forward that it was not on July 12th 1932 but on July 13th 1932 that he wrote the words: "I consent and buy" on the document and signed them, but, as will appear below, these allegations of Jan Bata, which have been disputed by Marie and Tom Bata, are of no importance with regard to the judgment of the Court of Appeal.

(27) Marie and Tom Bata on their part have reproached the District Court in their memorandum of objections for not having summed up all the established facts, but the Court of Appeal rejects this reproach. There is not only a distinct difference of opinion with regard to the facts enumerated by Marie and Tom Bata in support of their reproach and with regard to the qualification thereof, but moreover the reproach does not constitute an objection that could lead to a reversal of the disputed judgment, nor have Marie and Tom Bata formulated it as such in their memorandum of objections.

B. Sixth and seventh objections of appellants.

(28) The Court of Appeal considers it of importance first to examine the question what Tomas Bata intended to achieve with the documents of May 10th 1931 and May 19th 1931, and at the same time to deal with the sixth and seventh objections.

(29) Parties agree that Tomas Bata's wish was that after his death Jan Bata should be entrusted with the control of the concern. Their opinions differ, however, on

the question whether Tomas Bata also intended to hand over the ownership of the concern to Jan Bata. According to Jan, this had indeed been Tomas Bata's intention, without any reservation. Marie and Tom Bata however take the view that Tomas Bata drafted the documents of May 10th 1931 and May 19th 1931 especially with a view to evading death duties and that he only wanted to appoint Jan as a kind of trustee or stadtholder until the time when Tom would be able to take control himself. In this connection Marie and Tom Bata have also advanced that the document of May 10th 1931 only formed part of a scheme that had not yet been worked out.

(30) The District Court considered in this regard that Tomas Bata, when making his last will, evidently had the conviction that the continuance of his life work was best secured in Jan Bata's hands and that he evidently desired to leave it to Jan's discretion and to the way in which Tom would further develop to what extent Tom would succeed Jan in due course, while Tomas Bata, who himself had started with nothing, evidently considered Kc 8,100,-000.— and Kc 22,000,000.— sufficient as inheritances for his wife and son respectively. Besides this the District Court pointed to Tomas Bata's so-called moral testament, from which it is clear that he used to put the interests of his life work, the concern, foremost.

(31) Marie and Tom Bata advanced two objections against the above considerations, to wit the sixth and seventh objections. These objections amount to this:

sixth objection: the District court wrongly employed the "moral testament" also for the interpretation of the aforementioned documents of May 1931;

and the *seventh* objection: what the District Court considered with regard to Tomas Bata's intentions when writing the documents of May 1931 was of a purely speculative nature.

(32) It must be concluded from parties' allegations and productions that it was indeed Tomas Bata's wish to place the ownership of the concern founded and owned by him into Jan Bata's hands without any reservation, after his (Tomas's) death.

(33) This is in the first place apparent from the wording of the document of May 10th 1931 in connection with the wording of the last will of May 19th 1931. In the document of May 10th 1931 Tomas Bata declared that he sold Jan Bata his whole property without any reservation, except some assets specifically named by him, at the price mentioned by him, and in the last will of May 19th 1931 he took as basis for the estate to be bequeathed by him the debt which Jan Bata had to pay in the matter of this purchase price. In both documents Tomas explicitly spoke of a sale to Jan of the shares belonging to him, and from this mere fact it must be concluded that it was his wish that the ownership of the shares should be transferred to Jan.

(34) In the second place, from the manner in which Tomas Bata attended to the documents of May 10th 1931 and May 19th 1931 it must be concluded that he attached a great and very serious importance not only to the latter document but also to that of May 10th 1931. This is evident from the fact that—shortly before his operation in May 1931—Tomas Bata wrote and signed these documents by his own hand and even placed his signature twice on both documents because of additions; that he kept both documents in his private safe, each in a separate envelope, as appeared after his death when the safe was opened, while it is established between parties that he always carried the only key to this safe on his person; that the contents of the document of May 10th 1931 also formed the basis of the last will of May 19th 1931 acknowledged by Marie and Tom Bata as a codicil. On the grounds of all these circumstances, Marie and Tom Bata's allegation

that the document of May 10th 1931 was only a draft or formed part of a scheme not yet worked out must also be rejected.

(35) In the third place it follows from the dates May 10th 1931 and May 19th 1931 that Tomas Bata prepared these documents at a time when he wanted to settle his affairs. As appears from parties' allegations and productions, in or about March 1931 Tomas Bata was engaged in forming the Swiss company Leader A.G., which he intended to be a holding company of the majority of shares in various companies of the Bata concern; at the end of April 1931 the parent company at Zlin had been converted from a one-man business into a limited liability company; this company had been entered in the commercial register of the district court of Hradista, and at the end of May 1931 Tomas Bata had an operation. From these interrelated facts it must be concluded that Tomas Bata in the spring of 1931 felt the need of definitely establishing who was to succeed him in the management and also in the ownership of the concern.

(36) In the fourth place, the so-called moral testament is also of great importance for the examination of Tomas Bata's intentions. This is a document beginning with the words: "To go with my testament", and in it Tomas Bata wrote among other things that the first condition for the prosperity of the firm and for the safety of the money invested therein is that it must not be believed that the firm is his exclusive property and only serves his interests; that, as long as one only thinks of oneself, one will become useless and one's own decline is inevitable; that his firm was not founded for the purpose of maintaining the existence of those who had founded it, but that higher motives had influenced him; that he was actuated by an honest desire to enable each of his countrymen to have a part in the advantages which his firm gave to its workers and customers.

(37) The Court of Appeal assumes that this moral testament was found among the papers left by Tomas Bata, on the ground of the fact, that, as is established between parties, this document was also read out on July 13th 1932 by the district judge Loucka in Zlin. The Court of Appeal considers it irrelevant when Tomas Bata wrote this document and whether it was read out as part of the will of 1918 or—as Jan Bata alleges—as part of the last will of 1931, although The Court of Appeal wishes to remark that the latter is more plausible, seeing that the Eidesstattliche Erklärung states that the last will of 1931 had one undated annex and Marie and Tom Bata on their part have not mentioned any other document as annex to this last will, whereas the will of 1918, according to the said Erklärung, had nine annexes, all of which are established and have been identified as other documents than the aforesaid moral testament.

(38) The reading of this moral testament in itself proves that both the heirs of Tomas Bata and the estate notary Foerster and the district judge attached importance to this document. For this reason this document can certainly be used for the interpretation of the documents of May 10th 1931 and May 19th 1931 (cf. para. 582 A.B.G.B.) and the sixth objection must be declared unfounded.

(39) In the fifth place it appears from Tomas Bata's pronouncements embodied in the submitted book "Wort und Tat", and particularly from a recent speech held by him on the occasion of the fiftieth anniversary of his birthday ("Wort und Tat" pages 264/265), which speech i.a. contained the following words: "And although only one (son) bears my name, yet I have thousands of sons. And the best of them gets my violin. But not to play it for his own enjoyment; but to serve his brothers, to serve all mankind with it"—that it was Tomas Bata's primary object to secure a good successor to the concern (his son,

who was then still young, was not eligible as such) rather than to leave the concern to his legal heirs. In this it should also be considered that an undisputed and undisturbed one-man control of a concern is only effected, if the leader is owner of the (majority of) shares and that a man like Tomas Bata must have been fully av of this.

(40) The Court of Appeal therefore considers it proved by the aforementioned facts and circumstances, both separately and in their interrelation, that it was Tomas Bata's intention that the ownership of the shares belonging to him should unreservedly pass to Jan Bata.

(41) In this the Court of Appeal does not consider it impossible that Tomas Bata, having regard to the legal provisions concerning death duties, chose the form of a sale of the shares in order to achieve this aim. The aim itself is decisive, however, and, on the aforementioned grounds the Court of Appeal rejects Marie and Tom Bata's argument that the aim of the documents of May 10th 1931 and May 19th 1931 was an evasion of death duties by fictitious acts.

(42) Marie and Tom Bata's allegation that Tomas Bata wanted to appoint his half-brother Jan as trustee or stadtholder until the time when Tom Bata would be able to take control himself is contrary to the wording of the documents of May 10th 1931 and May 19th 1931, and no connecting point even remotely tenable can be found for this in any of the facts put forward by them. In this connection Marie and Tom Bata have indeed offered to prove that Tomas Bata had once entrusted 49 of the 100 shares in the Nederlandsche Bata Maatschappij to Dominic Cipera; that he had discussed with Cipera in what way it could be avoided that, at his death, the value of his property should be fixed one-sidedly by the tax authorities, and that on July 13th 1932 Jan Bata had said

to Marie Bata, in the presence of her sister-in-law Mrs. Mencik, that he interpreted Tomas Bata's intention thus that he was to administer the business property for Tom, but all these offers of proof must be rejected as being insufficient. The first proof tendered is irrelevant with regard to the judgment of the suit, because the cases cannot be compared with each other, and besides it has not been alleged that Tomas Bata had unreservedly sold the 49 shares concerned to Cipera for a certain amount. The proof tendered thereafter is insufficient, it being established between parties that Tomas Bata did not speak with Cipera about the document of May 10th 1931 and it does not follow ipso facto from Tomas Bata's question concerning death duties (regarding which question proof was tendered) that the said document was a fictitious act so as to evade death duties. The proof tendered last is insufficient, because it is here a question of the intentions of Tomas Bata himself, for the establishment of which the Court of Appeal considers decisive (if not exclusively, at any rate principally so) what Tomas Bata wrote, said and did, and on the other hand considers of no importance, at any rate not of essential importance, how on July 13th 1932 Jan Bata, still under the first impression of the death of his half-brother and guide Tomas, said he had understood that intention as has been put forward. Moreover, it would not in any case unmistakably follow from the said pronouncement that Jan Bata—contrary to his whole further behaviour—did not consider himself owner of the concern after Tomas Bata's death, because this pronouncement need not be regarded as implying more than that Jan Bata, at that time and in the given circumstances, felt morally obliged to appoint Tom later as his successor. For the matter of that, such an isolated pronouncement could not be a basis for a trustee relationship for which moreover no rules whatever were laid down. All the tenders of proof referred to must therefore be rejected.

(46) From the above considerations it follows that the seventh objection must also be declared unfounded.

C. Third objection of appellants.

(47) It should now first be examined what legal significance the document of May 10th 1931 has and whether it can be given legal validity.

(48) Jan Bata has primarily argued that this document was the confirmation of a verbal purchase agreement, which he had made with Tomas Bata during the latter's life. Alternatively Jan Bata invoked various other legal constructions, to wit, that the document concerned was allegedly an acknowledgment of debt as an agreement or as a legacy; that the document allegedly formed a purchase legacy (legatum venditionis causa), which was accepted by him—all this in, or not in, connection with the last will of May 19th 1931. All the constructions have been disputed by Marie and Tom Bata. They on their part have argued that the document of May 10th 1931 cannot give any legally valid title of transfer of ownership.

(49) The District Court assumed (paragraphs 41 et seqq. of its judgment) that there is not sufficient ground to set aside the verbal purchase agreement, invoked by Jan Bata, as being fictitious, also with regard to the last will of May 19th 1931, and that, if the verbal purchase agreement were an invention on Jan Bata's part, the documents of May 10th 1931 and May 19th 1931 nevertheless leave room for the opinion that they may obtain a legacy valid according to Czech law—legatum veditionis causa—in favour of Jan Bata. The third objection challeged this, which objection amounts to this that the District Court wrongly did not decide that Jan Bata cannot invoke a valid title for ownership, furthermore has wrongly not set aside as imagination the purchase contract alleged by Jan Bata and has wrongly considered it plausible that the documents

of May 10th 1931 and May 19th 1931 contained a legatum venditionis causa.

(50) Marie and Tom Bata first elucidate this objection with the argument that, as Jan Bata has primarily put forward that the document of May 10th 1931 was the written confirmation of a purhcase agreement, he cannot alternatively allege that this document combined with the last will of May 19th 1931 contained an acknowledgment of debt, an offer or a purchase legacy, as these alternative allegations are inconsistent with his primary point of view. This argument is unsound, as Jan Bata's alternative defence is in itself not inconsistent with the aforesaid primary point of view, because in all legal constructions put forward by Jan Bata the main question is whether a legally valid title of transfer of ownership can be construed for Jan from the documents of May 10th 1931 and May 19th 1931.

(51) The Court of Appeal considers there are no sufficient grounds to regard the verbal purchase agreement alleged by Jan Bata as proved. The documents of May 10th 1931 and May 19th 1931 one-sidedly drawn up by Tomas Bata do not furnish sufficient presumptions for this, and Jan Bata himself says he can give no further proof regarding the verbal agreement alleged by him. Moreover this standpoint of Jan Bata is hardly consistent with his arguments in his answering paper in the appeal, stating that Tomas Bata might still alter his plans with regard to him—Jan—before his death and that it was Tomas Bata's wish that his offer should not reach Jan until after his (Tomas's) death. This implies that Tomas Bata, during his lifetime, did not want to bind himself to Jan, and from the legal view (also according to Czech law) this rules out an agreement having come into existence between Tomas Bata and Jan Bata.

(52) Although the Court of Appeal does not assume that a purchase agreement was made between Tomas and

Jan Bata, this does not exclude that Tomas Bata discussed his intentions with Jan. But, in view of the foregoing considerations, no legal consequences could be attached to such a discussion.

(53) The foregoing entails that the document of May 10th 1931 is to be considered a voluntary one-sided act on the part of Tomas Bata, to wit a legal act which he did not wish to come into force until after his death, if he had not in the meantime destroyed or revoked the document.

(54) The consequence of this is, also in connection with the considerations sub *B* concerning Tomas Bata's intentions, that in order to judge the legal significance of the said document it must be interpreted in connection with the last will of May 19th 1931, and that it must now be examined what significance must be attached to this last will.

(55) Here too, the parties' opinions differ. According to Marie and Tom Bata the said last will is a codicil in the sense of para. 553 A.B.G.B., according to Jan Bata the last will is a testament in the sense of this article.

(56) This difference of opinion between parties resolves into the question, whether one or more heirs have been appointed in the last will, as is alleged by Jan Bata, or whether this document merely contains other dispositions and particularly only legacies in the sense of para. 535 A.B.G.B., as is alleged by Marie and Tom Bata.

(57) In the opinion of the Court of Appeal, the latter view of the matter is the correct one. Having regard to the provisions of para. 535 and para. 532 A.B.G.B., the document of May 19th 1931 must be regarded as a codicil, since it only mentions a disposition or bequest of specifically described assets, both in favour of the legal heirs and of others, and is established between parties that the list of assets contained therein did not comprise all of Tomas Bata's property.

(58) This does not alter the fact that Tomas Bata directed in the aforesaid last will that he left to his son "the legal portion" Kc. 22,000,000.—, as the mention of the legal portion should be considered a motive for the size of the sum to be left to Tom Bata.

(59) The foregoing consideration is strengthened by the circumstance that, according to the deed of transfer (Einantwortung) dated June 28th 1933, the Czech authorities too regarded the last will as a codicil and recognized Marie and Tom Bata as heirs of Tomas Bata for one/fourth and three/fourth parts respectively, as well as by the fact that Tomas Bata's private possessions, not mentioned in the last will of May 19th 1931, were divided without any protest from anyone between Marie and Tom Bata as legal heirs in the aforesaid proportions.

(60) For this reason the last will of May 19th 1931 will hereinafter be referred to as "codicil".

(61) The Court of Appeal is of the opinion that this codicil contained a purchase legacy in favour of Jan Bata, as was rightly considered by the District Court, if a verbal purchase contract should not be assumed.

(62) This follows in the first place from the clear connection between the last will of May 19th 1931, which was acknowledged by Marie and Tom Bata in the Eidesstattliche Erklärung of June 23rd 1933 as a legally valid codicil and the document of May 10 1931 written a few days previously. In virtue of para. 655 A.B.G.B. the latter document, written and signed by the testator in his own hand, may be employed as a means of interpretation of the last will of May 19th 1931. It makes no difference that this document is not specifically mentioned in the codicil, as documents which are not specially referred to in a will or in a codicil can also serve for purposes of interpretation. Therefore the codicil, though mentioning the sale only in the beginning, must be

interpreted in the sense that Thomas Bata wished to bequeath and has bequeathed to Jan Bata a right of purchase with regard to the concern, to wit the shares of the companies belonging thereto, and made further bequests as specified in the codicil out of the purchase sum of Kc. 50,000,000.—and out of the assets excluded from the right of purchase.

(63) In the second place testator's wish to bequeath a right of purchase to Jan Bata in the last will of May 19th 1931 must be concluded from the circumstance that not only the codicil but also the document of May 10th 1931 could always be revoked by Tomas Bata and that he used the word "purchase", without binding himself to delivery before his death.

(64) Marie and Tom Bata advanced against this that such a purchase legacy should have been reported when the deed of transfer (Einantwortung) was made and should have been dealt with as such with a view to the death duties. According to para. 684 A.B.G.B., however, the right of the legatee *ipso facto* comes into existence in consequence of the testator's death, except that delivery has still to take place, while there is no provision anywhere in Czech law saying that a legacy becomes null and void in case the legatee does not report it at the "Einantwortung". Besides, at the "Einantwortung" the district court itself took the view that Jan Bata had become entitled to the aforesaid shares as a result of purchase, which appears from the fact that the said court put Marie and Tom Bata in possession of the portions of the purchase sum bequeathed to them. As to the death duties, the fact that a legatee—rightly or wrongly—gives the tax authorities a legal construction which involves a smaller amount of transfer rights to be paid does not affect the legal validity of the legacy.

(65) It furthermore appears from the wording of the documents of May 10th 1931 and May 19th 1931 that it

was Tomas Bata's wish to bequeath to Jan Bata the right of purchase in respect of all the shares held by Tomas Bata at his death and not only in respect of the shares owned by him in May 1931. This follows particularly from the fact that in the last will of May 19th 1931, which was not meant to be opened until after Tomas Bata's death, the property disposed of was unreservedly fixed at the purchase price of all the shares sold in the companies at home and abroad and that the document of May 10th 1931 mentions, after the specification of shares sold, that the sale, except for the specifically excluded assets, comprises Tomas Bata's whole property, also as far as it is not specified in the said document.

(66) Now that the Court of Appeal assumes that a purchase legacy was bequeathed to Jan Bata, it is not necessary further to examine whether the documents of May 10th 1931 and May 19th 1931 are possibly to be regarded as an acknowledgment of debt or as an offer. However, the Court of Appeal wishes to observe that it is not quite correct to regard the aforesaid disposition as an acknowledgment of debt now that a bilateral agreement was bequeathed and the difference between an acknowledgment of debt and a purchase legacy exactly lies in the one-sided or the two-sided nature of the dispositions (*cf.* para. 665 A.B.G.B.), while in connection with the provisions of para. 862 A.B.G.B. it is also difficult to speak of an offer, since it has not been proved that Tomas Bata already made an offer to Jan Bata during his lifetime. The difference between a purchase offer and purchase legacy is exactly this that the former is made between living persons and the latter by a last will.

(67) As Marie and Tom Bata have not disputed this, if Tomas Bata bequeathed a purchase legacy to Jan Bata, such a would be legally valid under the Czech law in force in 19 it follows from the above consideration that Tomas Bata disposed in a legally valid

manner of the ownership of the shares of the companies belonging to his concern in favour of Jan.

(68) This implies that the alternative invocation of conversion made by Jan Bata need not be examined any more.

(69) For the legal validity of Jan Bata's title it is furthermore necessary that he has accepted the aforesaid legacy. As to this, Marie and Tom Bata dispute that such an acceptance had been made, at any rate to them. This contestation must be rejected, however. Jan Bata's acceptance of the legacy, also vis-à-vis Marie and Tom Bata, appears from the words: "I consent and buy" written by him underneath the document of May 10th 1931 in the presence of the estate notary, from the fact that he immediately took over control of the concern, from the initiative taken by him for Marie and Tom Bata's coöperation in the transfer to him of registered shares in the concern, from the payment of the purchase sum made by Jan Bata by passing it or causing it to be passed to the debit of his account in the books of the firm of Bata A.S. and crediting or having credited the account of the heirs Marie and Tom Bata in the said books with the amounts due to them from this purchase sum, and finally from his utterance made shortly after Tomas Bata's death and mentioned by Marie and Tom Bata themselves: "there, now it is all mine." In any case the aforesaid acceptance appears from these circumstances in their interrelation. In this it is of no importance, whether Jan Bata considered himself the buyer or the legatee, as in both cases the upshot for him was that he bought all the shares concerned for a fixed price.

(70) From the grounds laid down in this part it follows that Jan Bata can invoke a valid legal title and that the third objection must be rejected.

D. Fourth objection of appellants.

(71) It must now be examined whether Jan Bata has become owner of the shares left to him in the legacy and particularly whether he has become owner of the shares in the limited liability company Nederlandsche Schoen-en Le fabrieken Bata-Best forming the issue in this suit.

(72) Marie and Tom Bata have put forward in the first instance that no legally valid transfer to Jan Bata of the ownership of the litigious shares in the aforesaid company has ever taken place and that Jan Bata cannot invoke a manner of obtainment of ownership recognized by the law. Jan Bata on his part has advanced that the shares at issue in this action were delivered to him in legally valid manner and that, even if this were not the case, he has become owner of the said shares by acquisitive prescription;

(73) The District Court never dealt with this point of dispute, because it already rejected the claims of Marie and Tom Bata on other grounds, to wit, because it considered the invocation by Jan Bata of forfeiture of rights correct. The fourth objection amounts to this, that the District Court wrongly passed over their arguments laid down in the preceding consideration.

(74) Leaving aside for the time being whether the decision of the District Court regarding Jan Bata's invocation of forfeiture of rights is well founded, which question will be examined below sub F, the question as to whether the shares at issue were transferred to Jan Bata in a legally valid manner is irrelevant if Jan Bata's invocation of pro-acquisitive prescription can be accepted.

(75). Jan Bata here invokes the provisions of para. 1466 A.B.G.B. to the effect that the right of ownership of a movable asset is obtained during three by "rechtlicher Besitz" (legal possession). According to para. 1460

A.B.G.B. there is "redlicher Besitz" if one actually possesses a thing, this possession is "rechtmassig" (rightful), "redlich" (reasonable) and "echt" (real) and the possession continues for the full term of three years fixed in the law.

(76) As has been decided sub C, at Tomas Bata's death Jan Bata obtained a legal claim to all shares in the companies forming part of the concern referred to in this lawsuit, of which Tomas Bata was the owner at the time of his death, also to the shares which Tomas Bata acquired after May 19th 1931. This latter fact involves that the 225 old shares in Bata-Best need not be divided for the decision into 51 shares already held by Tomas Bata before May 19th 1931 and 174 shares which he acquired afterwards and—as has been established between parties—before his death.

(77) Parties agree that, for more than three consecutive years since Tomas Bata's death, Jan Bata had actual control of the litigious shares. Marie and Tom Bata have advanced, however, that Jan Bata has not had the wish to own these shares for himself but only had them in his keeping as holder for them, while in case it should be assumed that Jan Bata was not the holder but the possessor of those shares, they disputed that his possession was "rechtmassig", "redlich" and "echt".

(78) Marie and Tom Bata's point of view that Jan Bata became no possessor but only the "Inhaber" in the sense of para. 309 A.B.G.B. (*i.e.* the holder for another party) of the aforesaid shares must be rejected. For it is admitted between parties that Jan Bata wrote on the document of May 10th 1931: "I consent and buy", thereby indicating that he wished to exercise the rights of a buyer in respect of the shares; that he also said shortly after Tomas Bata's death: "There, now everything is mine"; that he desired the transfer of registered shares to his

name, which desire was complied with by Marie and Tom Bata without any protest; that after Tomas Bata's death he, always in his own name without ever consulting Marie and Tom Bata (with which fact they even reproach him in the lawsuit), exercised the rights of an owner with regard to all shares including those now at issue, by voting with them without any consultation with Marie and Tom Bata or by giving powers of attorney to vote in his name and by acting as the leader of the concern; that on his departure for America he took the mantles of the shares now at issue with him and handed the coupon sheets thereof to his confidential man Muska. Jan Bata furthermore advances that he has never said that he had these shares in his keeping for Marie and Tom Bata, whereas with reference to this Marie and Tom Bata only mention one statement of Jan Bata's to the effect that he interpreted the last will of May 19th 1931 thus that he was to administer the business property for Tom, which argument they have offered to prove. This offer of proof has already been dealt with hereinbefore in the 42nd consideration and been found beside the point, and in this connection it may be added that here too the offer must be rejected as being irrelevant, because even if Jan Bata should originally have made a statement on July 13th 1932 as alleged by Marie and Tom Bata, this statement made under the impression of Tomas Bata's death, would be a statement apart and would not affect Jan Bata's aforementioned acts of possession.

(79) In view of the fact that Jan Bata began to perform the acts of possession mentioned in the previous consideration immediately after Tomas Bata's death, he has never been "Inhaber" in the aforementioned sense of the aforesaid shares including those now at issue, so that Marie and Tom Bata invoke the provisions of para. 318 and para. 319 A.B.G.B. in vain.

(80) Furthermore Jan Bata's possession of the shares now at issue was certainly "rechtmässig", "redlich" and

"echt" (rightful, reasonable and real). It was "rechtmässig" in the sense of para. 316 and para. 1461 A.B.G.B., it being based on a legally valid title, as follows from the decisions given sub C. It was "redlich" in the sense of para. 326 and para. 1463 A.B.G.B., because on the ground of the said title could and did consider the shares now at issue as belonging to him, whereas the allegations made by Marie and Tom Bata to dispute this could at most lead to doubt—for which doubt there is no ground, however, in the opinion of the Court of Appeal—, in which case the "redlichkeit" (reasonableness) of the possession in the sense of para. 328 A.B.G.B. could nevertheless be presumed. Then, the possession is "echt" (real) in the sense of para. 1464 A.B.G.B., because none of the acts of possession referred to in the 78th consideration are based on violence or fraud or have been performed in secret or as a holder on trust, but have all been performed openly, without anybody protesting, although this was always possible.

(81) From the above consideration it follows that in any case, regardless of the manner in which Jan Bata obtained possession of the shares now at issue, he has since become owner of these shares in virtue of para. 14 66 A.B.G.B. This implies that already on this ground the fourth objection must be rejected.

F. Fifth objection of appellants.

(95) The District Court declared founded Jan Bata's invocation of forfeiture of rights, and in its clear and accurately formulated judgment it primarily rejected Marie and Tom Bata's claims on these grounds. Their fifth objection is directed against this. It says that the District Court wrongly did not allow them to prove their better rights to the shares at issue, because in the opinion of the District Court they had forfeited the right to give such proof.

(96) It follows from what has been considered hereinbefore that Marie and Tom Bata have no right whatever to the shares at issue, so that the District Court rightly did not allow them to prove their better right to them. Consequently the question as to whether they have forfeited any rights is no longer of importance.

(97) Nevertheless the Court of Appeal will deal with this question too. The Court of Appeal has come to the conclusion that the District Court has rightly accepted Jan Bata's invocation of forfeiture of rights. For this reason the fifth objection is also unfounded.

(98) In the first place the Court of Appeal arrives at this conclusion, because Jan Bata's argument is correct, saying that the claims alleged by Marie and Tom Bata are contrary to the "Eidesstattliche Erklärung (Declaration in lieu of oaths) of June 23rd 1933. As appears from the official record made thereof, Marie and Tom Bata then declared and acknowledged that, according to the codicil of May 19th 1931 recognized by them as correct, Tomas Bata left a fortune of Kc. 57,262,131, consisting of a claim on Jan Bata in respect of the purchase amount of all the shares sold him in the companies at home and abroad belonging to the concern and that this claim had been settled, while they accepted the legacies and did not acknowledge some claims figuring in the Erklärung as falling to the charge of the company Bata A.S. These declarations and acknowledgments had a dispositive significance, regardless of the question whether the purchase and sale described in the codicil did or did not give Jan Bata a valid title of acquisition of ownership, and Marie and Tom Bata are bound to them. Here it was not a question of forgotten or unknown assets.

(99) In order to dispute that they are bound by this official record, Marie and Tom Bata invoked error, consisting in the circumstance that at that time they were not acquainted with the document of May 10th 1931 and had

therefore got a wrong conception of the legal validity of the title of transfer. If however the aforementioned dispositive significance of the official record of June 23rd 1933 could be affected by an invocation of error, any error in the sense of para. 871 A.B.G.B. would nevertheless be out of the question, seeing that an error as referred to by Marie and Tom Bata then would not have been elicited by Jan Bata, but by the codicil drawn up by Tomas Bata and this error should not have struck Jan Bata either, while Marie and Tom Bata have not made plausible either that Jan Bata was aware of this error in time. The offer of proof that Jan Bata had allegedly secreted the document of May. 10th 1931 (page 74 of the memorandum of objections) must therefore be passed over as being irrelevant.

(100) For that matter, it would be hard to speak of concealment of a document like that of May 10th 1931, as Jan Bata opened this document in the presence of four witnesses, to wit the estate notary Foerster, Marie Bata's own brother Dr. A. Mencik, the manager Vavrecka and Cipera, often mentioned in the suit, and, as Marie and Tom Bata themselves state in their memorandum of objections, he gave these witnesses an opportunity to read the said document, which they did.

(101) In the second place it must also be assumed on the ground of the following interrelated facts that Marie and Tom Bata have forfeited their right, to wit: they cooperated in the delivery of registered shares without any reserve and without making inquiries; until 1945 they unreservedly allowed Jan Bata to exercise in his own name his rights of shareholder; without any protest they accepted the numerous current accounts, on which their balances with Bata A.S. had been increased by interest in respect of their claims on the said company, which claim had its origin in the purchase sum for the shares sold.

(102) The Court of Appeal leave undiscussed as being irrelevant, whether Marie and Tom Bata were or were not acquainted with the document of May 10th 1931 before 1945, though it should be remarked that it must be considered most improbable that they were not acquainted with its contents before 1945. But even if they were unacquainted with this document before 1945, they should have made it their business to make further inquiries if, after having taken cognizance of the codicil, they were in any way interested in the legal basis of the sale laid down in the codicil. In view of the circumstance that they neglected this and never made any reservation, Jan Bata was entitled to assume that Marie and Tom Bata agreed to Thomas Bata's dispositions. The offer of proof that they were not acquainted with the document of May 10th 1931 before 1945 must therefore be passed over as being irrelevant.

(103) To contest the invocation of forfeiture of rights, Marie and Tom Bata have offered on page 73 of their memorandum of objections to prove that the persons present at the opening of Thomas Bata's safe on July 12th 1931 must have been very much alive to the fact that great caution had to be exercised and the utmost discretion was imperative, because they were convinced that the document of May 10th 1931 offered the opportunity to evade the high death duties on Thomas Bata's large estate, and that for this reason they spoke to no one, even to them, about the said document before 1945. This offer of proof must also be passed over as being irrelevant, as in this suit it could only have significance with regard to the question whether Marie and Tom Bata were acquainted with the document of May 10th 1931 before 1945, and this is irrelevant as has already been determined in the preceding consideration.

(104) Marie and Tom Bata have furthermore observed that, even if they should have forfeited their

rights, this would not imply that the ownership of the shares now at issue has passed to Jan Bata. This may in itself be correct (above it was considered that this ownership did pass to Jan Bata on other grounds), but the fact that they forfeited their rights involves that they lost the competence to put in the claims referred to. This is a common principle of law, which is also adopted in Czechoslovakia (at any rate before 1945).

(105) The Court of Appeal wishes to point out here that the objections of Marie and Tom Bata are not concerned with a favouring of Jan Bata by Tomas Bata to their cost—for this was clearly evident from the codicil itself, which was accepted by them—but only an invalidity alleged by them of the title of acquisition of ownership and of the ensuing transfer. Therefore these objections are only of a purely formal nature. This ought to have afforded Marie and Tom Bata all the more reason to immediately investigate the basis of the sale mentioned in the codicil of May 19th 1931, if they were interested therein. To this end they could easily have consulted the estate notary. Since they failed to make such investigation, they could not revert to it in 1945";

On the aforementioned grounds and other considerations, immaterial in the final appeal, the Court of Appeal upheld the judgment of the District Court, amplifying its grounds;

Whereas plaintiffs in final appeal dispute The Court of Appeal's judgment with the following objections:

"I. Violation or misapplication of the articles 175 of the Constitution, 20 of the Act on Judicial Organization, 48, 59, 103, 104, 199, 200, 347 and 353 of the Code of Civil Procedure, 1902, 1903, 1932, 1941, 1942, 1943, 1944, 1945, 1952, 1959 of the Civil Code.

in that the Court of Appeal has considered and determined as has been stated in the judgment; in particular

in the 42nd consideration to be regarded as having been embodied herein.

wrongly so, because in general, for the judgment of the question whether the proof of witnesses tendered by Marie and Tom Bata was relevant or sufficient, it was not decisive or at any rate absolutely decisive whether each of the facts for which evidence was tendered was in itself relevant or adequate, but that the Court of Appeal ought furthermore to have ascertained whether all the facts for which evidence was tendered, taken together and in conjunction with the facts established elsewhere, could contribute to the decision in respect of a point of dispute between parties,

and in particular the opportunity for plaintiffs to tender parol evidence of the conversation alleged by them to have taken place tween Tomas Bata and Dominic Cipera as to the way in which it might be avoided that at his death the value of his property should be one-sidedly determined by the tax authorities, and of the utterance alleged by them to have been made by Jan Bata to Marie Bata on July 13th 1932, saying that he understood Thomas Bata's intention thus that he was to administer the business property for Tom, should not have been withheld from plaintiffs on the ground of the Court of Appeal's naturally initial opinion concerning what could be concluded from the said facts if proved, in which connection are also of importance the Court of Appeal's pronouncement in the 7th consideration that the actual value of the shares referred to in the document of May 10th 1931 was a multiple of 50 million Czech crowns and the possibility assumed by the Court of Appeal in its 41st consideration that Tomas Bata, taking into account the legal provisions concerning succession, chose the form of a sale of the shares owned by him, so as to achieve his object (assumed by the Court of Appeal) to transfer the ownership of all the said shares to Jan Bata,

and the Court of Appeal has thus passed over the aboresaid offers of evidence on insufficient grounds or has not stated grounds for this in its judgment as required by the law;

II. Violation or misapplication of the articles 175 of the Constitution, 20 of the Act on Judicial Organization, 5, 48, 59, 134, 141, 144, 332, 343, 347, 348, 349, 353 of the Code of Civil Procedure,

in that, with reference to the third objection of Marie and Tom Bata,

in which they advanced, i.a.

"Jan Bata invokes four possible titles:

A. verbal purchase;

B. purchase by contract;

C. an accepted, binding offer;

D. legacy,

Appellants consider it to be contrary to the first principles of proper legal procedure that a party to a suit adopts four separate standpoints that are so highly contradictory as to exclude one another", and

"The legacy construction is alternatively presumed possible by the District Court. Like Jan Bata, the District Court has overlooked that the purchase agreement and the legacy construction are inconsistent with each other and cannot fit onto one and the same complex of facts. In the former case mutual consent between Tomas and Jan is to be assumed, for a purchase is a bilateral agreement. In case of a legacy a unilateral agreement is concerned. This implies that either one or the other must be assumed, but it will not do to presume both possibilities as existing side by side."

the Court of Appeal has considered and determined as has been laid down in its judgment, particularly in the

50th consideration, which is to be regarded as having been embodied herein,

wrongly so,

because in this regard the position is not, or not exclusively and absolutely, that various juridical constructions built on one and the same complex of facts are concerned, or does not, exclusively and absolutely, hinge on the question whether a legally valid title of transfer of ownership can be constructed for Jan Bata from the documents of May 10th 1931 and May 19th 1931,

seeing that particularly Jan Bata's defence of verbal sale (as put forward in the first action in the speeches of counsel and accepted as correct by the District Court) on the one hand and his defence of a (purchase) legacy (as accepted by the Court of Appeal) on the other are indeed based on factual grounds that are mutually different and fully or partially exclude each other,

and the Court of Appeal, while paying due regard to the aforementioned passages from the memorandum of objections, should also have judged and determined whether in this respect the procedure of Jan Bata was not contrary to the principles of proper legal procedure underlying the articles quoted, both in the first instance and in the appeal, and therefore was inadmissible;

III. Violation or misapplication of the articles 175 of the Constitution, 20 of the Judicial Organization Act, 48 and 59 of the Code of Civil Procedure,

in that the Court of Appeal,

rightly assuming that Marie Bata and Tomas Bata junior act as Tomas Bata's heirs in virtue of the law for one/fourth part and three/fourth parts respectively, and deciding, on grounds which the plaintiffs deem incorrect but which they cannot successfully attack in final appeal on account of their factual character, that testator bequeathed, by his codicil of May 19th 1931 in connection with his document of May 10th 1931, the right to buy his full present and

future property (except some assets specifically mentioned) for the price of 50 million Czech crowns, which legacy was accepted by Jan Bata,

and starting from the circumstance that under applicable Austrian (Czech) law a legal transfer (Einantwortung) of the estate to the legal heirs was required and took place on June 28th 1933,

when dealing with the third objection has rejected Marie and Tom Bata's defence that such a purchase legacy ought to have been reported in the "Einantwortung", and has declared the fourth objection unfounded mainly on the ground that in any case, irrespective of the manner in which Jan Bata had got into possession of the shares at issue, he since became owner of these shares as a result of acquisitive prescription,

wrongly so,

because in this way the Court of Appeal did not make sufficient distinction between the arising of Jan Bata's right as legatee, which implies competence to buy testator's full property (subject to exclusions) for a fixed price, and the delivery to the legatee of the assets bought after acceptance of this legacy and consequently obtained under general title, although, as ascertained by the Court of Appeal, Austrian (Czech) law does not recognize immediate transfer of property even between the testator and his heirs, but makes this transfer effective only at and as a result of the "Einantwortung", and therefore the Court of Appeal should have examined, amplifying the legal grounds if necessary, whether the delivery of the estate sold was not contingent upon the fulfillment of the same formality, and, in conjunction therewith, whether the possession of the shares at issue, obtained by Jan Bata without an "Einantwortung" in his behalf, answered the requirements made by the Austrian (Czech) law in respect of acquisitive prescription,

so that on these points the Court of Appeal did not state reasons in its judgment as required by the law;

IV. Violation or misapplication of the articles 175 of the Constitution, 20 of the Judicial Organization Act, 48, 50, 103, 104, 199, 200, 347, 353 of the Code of Civil Procedure, 1374, 1375, 1902, 1903, 1932, 1941, 1942, 1943, 1944, 1945, 1952, 1959 of the Civil Code,

in that the Court of Appeal, declaring unfounded the fifth objection, has judged that the District Court has rightly accepted Jan Bata's invocation of forfeiture of rights, on the grounds laid down in the Court of Appeal's judgment in the 98th up to and including the 100th considerations and in the 101st up to and including the 105th considerations respectively, all of which are to be regarded as having been embodied herein,

wrongly so,

a) because in their explanation to the said fifth objection Marie and Tomas Bata had put prominently forward that under Austrian (Czech) law ownership cannot get lost as a result of forfeiture of rights and the "Verwirkung" (comparable with the forfeiture of rights of Netherlands law) is only known in the law of obligations, for the substantiation of which allegation they had referred to detailed and reasoned Opinions of the professors Klang and Ehrenzweig submitted by them, in which the opposite opinion expressed unmotivated or scarcely motivated in the Opinions of the professor Wolff submitted by Jan Bata are strongly contested,

all of which has not, or not conclusively, been laid down in the Court of Appeal's 104th consideration, to the effect that the fact of Marie and Tom Bata having forfeited their rights would involve that they (have) lost the right to make the aforesaid claims, and that this would be a general principle of law which is also recognized in Czechoslovakia (at any rate prior to 1945), so that in this regard the judgment does not state reasons as required by the law;

b) because the Court of Appeal's view, laid down particularly in the 99th and 100th considerations, that an error as referred to by Marie and Tom Bata—to wit: that they were not acquainted with the document of May 10th 1931 at the time of the "eidesstattliche Erklärung" of June 23rd 1933 and therefore had formed an inaccurate conception of the legal validity of the title of transfer—had not been elicited by Jan Bata but by the codicil made by Tomas Bata, and that this error should not have struck Jan Bata either, while it has not been made plausible either that Jan Bata was acquainted with the said error in time, is not consistent or at any rate not absolutely consistent with—or has not been substantiated with reasons as required by law in respect of—the facts alleged by Marie and Tom in their fifth objection sub *a*, for which they offered evidence by witnesses,

and therefore the Court has ignored wrongly, without stating grounds, at any rate without stating grounds understandable in this connection, the aforesaid tender of evidence which comprised more and other facts besides the fact that Jan Bata had allegedly secreted the document of May 10th 1931,

all of which does not alter the Court of Appeal's opinion that, on the grounds mentioned by the said Court, it would be hard to speak of a concealment of a document as that of May 10th 1931;

c) because the facts enumerated by the Court of Appeal in the 101st through 105th considerations, also in their interrelation and in connection with the facts and circumstances mentioned hereinafter, cannot justify the Court of Appeal's pronouncement that Marie and Tom Bata have forfeited their rights,

at any rate the Court of Appeal has stated no grounds or adequate and understandable grounds for its decision in this regard against the facts and circumstances referred to sub *b*, advanced by Marie and Tom Bata in their fifth

objection and in respect of which they offered proof by witnesses,

particularly not against Marie and Tom Bata's allegations (for which they tendered parol evidence) and facts laid down in the first objection assumed by the Court of Appeal as being established, which facts were relevant and sufficient for the judgment of the plea of forfeiture of rights;"

Whereas the Nederlands Beheersinstituut (Netherlands Custodian Office) have advanced by statement of reply that the appeal, so far as directed against them as co-defendants, is inadmissible, seeing that they were no party to the suit in previous instances, and they cannot become a party either through the summons in final appeal in a suit in which they have not taken part before;

Whereas by statement of reply to the objection of inadmissibility raised, plaintiffs in final appeal have contested this objection, advancing that they did not become aware of the fact that Jan Bata must be considered an enemy subject until after the exchange of the memorandums in appeal, and the Nederlands Beheersinstituut, being custodians of Jan Bata's property, have an interest in this action;

Considering with reference to the *objection of non-admissibility* raised by the Nederlands Beheersinstituut:

that this is represented correctly, as the challenged judgment does not affect the Nederlands Beheersinstituut, they being no party in the preceding instances;

Considering with reference to the *first objection in final appeal;*

that, in regard to the allegation of the heirs of Tomas Bata, saying that he wanted to appoint his half-brother Jan as trustee or stadtholder until the time when Tom Bata himself could take control, the Court of Appeal has judged that no even remotely tenable connecting-point is to be found in any of the facts advanced in support of this

allegation, which judgment implies that according to the Court of Appeal these facts, even when taken collectively, could not in any way serve to support the said allegation;

that, as regards the discussion of Thomas Bata and Dominic Cipera and Jan Bata's utterance to Marie Bata on July 13th 1932 particularly mentioned in the objection, the Court of Appeal has indicated why it did not consider these matters relevant even if they were proved, while the Court of Appeal has rejected the offer of evidence on the said ground and not on the ground of any initial opinion concerning the probative value of what the witnesses might possibly declare;

that consequently the complaints contained in the objection are unfounded;

Considering in regard to the *second objection:*

that, according to the Court of Appeal, Jan Bata's defence amounted to this that he primarily took the view that the document of May 10th 1931 was the written confirmation of a purchase agreement and that he alternatively maintained that the said document, in combination with the last will of 19th May 1931, contained an acknowledgment of debt, an offer or a purchase legacy;

that the Court of Appeal has rightly judged that the primary defence in itself is not inconsistent with the alternative, because it is advanced in both of them that Tomas Bata had the intention to cause the transfer of the ownership of his shares to Jan against a counter-performance on the latter's part, while from the view of proper legal procedure there is no objection that Jan, in case he should not be able to make plausible that Tomas had bound himself to him already during his life, advanced and made plausible that Tomas had expressed his wish in the two aforementioned documents in a legally valid manner;

that therefore the second objection also fails;

Considering with reference to the *third objection*:

that the Court of Appeal has recognized Jan Bata's rights of ownership of the shares at issue—among other things—on the ground of the existence of a legally valid title, irrespective of the manner in which he obtained the ownership of the shares;

that the third objection complains that the Court of Appeal, not sufficiently distinguishing between the arising of Jan Bata's right as legatee and the delivery of the estate sold, has not stated grounds as required by the law for its judgment that a legally valid title was concerned here, inasmuch as the Court of Appeal, while ascertaining that Austrian (Czech) law does not recognize the immediate transfer of property even between testator and heirs, but makes it effective only at and as a result of the "Einantwortung", had allegedly not properly examined whether at any rate the delivery of the estate sold was not contingent upon the same formality and whether in this connection the ownership obtained by Jan Bata of the shares at issue indeed answered the requirements made by the Austrian (Czech) law to acquisitive prescription;

that, however, it can certainly not be considered a lack of motivation that the Court of Appeal, in addition to what it considered in this connection in the paragraphs 64 and 80 of its considerations regarding the law, paid no heed to the aforesaid distinction, which does not appear to have been brought forward to the Court of Appeal;

Considering that, as the Court of Appeal's considerations as referred to hereinbefore independently support its decision, the *fourth objection*, directed against another independent ground, needs no discussion;

declares inadmissible the appeal, so far as directed against the Nederlands Beheersinstituut;

rejects the further appeal;

Condemns plaintiffs in the cost incurred thereon, estimated up to the pronouncement of this judgment on the side of the respondent sub 1 at one hundred and thirty

guilders and forty-five cents for disbursements and at one thousand guilders for fees, on the side of the Nederlands Beheersinstituut at twenty-two guilders and fifty cents for disbursements and at two hundred guilders for fees and on the side of the other co-defendant at nil.

Thus decided by Messrs. Donner, President, Van der Meulen, Losecaat Vermeer, Smits and Boltjes, Justices, and pronounced by the aforesaid President in the public session of the eighteenth November nineteen hundred and fifty-five, in the presence of the Solicitor-General Langemeyer.

(signed) J. Donner.
" H. L. Morsink.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960 No.

JAN A. BATA

Petitioner

v.

THOMAS J. BATA; THOMAS J. BATA and DAVID GRAHAM as Executors of the Estate of Mary T. Bata, and WESTERN INVESTMENT AND TRADING COMPANY LIMITED, a Bermuda Corporation

Respondents

APPENDIX D

To Petition for Writ of Certiorari

The Treaties between Brazil and the United States

Treaty of Friendship proclaimed 1829
Treaty Series, No. 34

Status of Aliens Treaty proclaimed 1939
Treaty Series, No. 815

APPENDIX D

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Treaty of Peace and Friendship
between the United States and Brazil
Treaty Series No. 34
8 Stat. 390 1

The Status of Aliens Treaty
between *inter alia* the United States and Brazil
Treaty Series No. 815
46 Stat. 2753 18

TREATY

BETWEEN

THE UNITED STATES AND THE EMPIRE OF BRAZIL.

Peace, Friendship, Commerce, and Navigation

SIGNED AT RIO DE JANEIRO, DECEMBER 12, 1828
RATIFICATION ADVISED BY THE SENATE, MARCH 10, 1829
RATIFICATIONS EXCHANGED AT WASHINGTON, MARCH 18, 1829
PROCLAIMED, MARCH 18, 1829

(Note: Articles relating to commerce and navigation terminated on December 12, 1841).

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

WHEREAS a Treaty or General Convention of Peace, Friendship, Commerce and Navigation, between the United States of America, and His Majesty the Emperor of Brazil, was concluded and signed at Rio de Janeiro, on the twelfth day of December 1828, which Treaty or General Convention is, word for word, as follows.

In the name of the Most Holy and Indivisible Trinity.

The United States of America and His Majesty the Emperor of Brazil, desiring to establish a firm and permanent peace and friendship between both nations, have resolved to fix in a manner, clear, distinct and positive, the rules which shall in future be religiously observed

between the one and the other, by means of a Treaty or General Convention of Peace, Friendship, Commerce and Navigation.

For this most desirable object, the President of the United States has conferred full powers on William Tudor their Chargé d'Affaires at the Court of Brazil: and His Majesty the Emperor of Brazil on the Most Illustrious and Most Excellent Marquez of Aracaty, a member of His Council, Gentleman of the Imperial Bed Chamber, Councillor of the Treasury, Grand Cross of the Order of Aviz, Senator of the Empire, Minister and Secretary of State for Foreign Affairs; and Miguel de Souza Mello e Alvim, a Member of His Council, Commander of the Order of Aviz, Knight of the Imperial Order of the Cross, Chief of Division in the Imperial and National Navy, Minister and Secretary of State for the Marine, who after having exchanged their said full powers, in due and proper form, have agreed to the following articles:

ART. 1st. There shall be a perfect, firm and inviolable Peace and Friendship between the United States of America and their citizens, and His Imperial Majesty, his successors, and subjects, throughout their possessions and territories respectively, without distinction of persons or places.

ART. 2d. The United States of America and His Majesty the Emperor of Brazil, desiring to live in peace and harmony with all the other Nations of the Earth, by means of a policy frank and equally friendly with all, engage mutually, not to grant any particular favor to other nations in respect of commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same freely, if the concession was freely made, or on allowing the same compensation, if the concession was conditional. It is understood however, that the relations and Conventions which now exist,

or may hereafter exist between Brazil and Portugal shall form an exception to this article.

ART. 3. The two high contracting parties being likewise desirous of placing the commerce and navigation of their respective countries, on the liberal basis of perfect equality and reciprocity mutually agree, that the citizens and subjects of each may frequent all the coasts and countries of the other, and reside and trade there in all kinds of produce manufactures and merchandise: and they shall enjoy all the rights, privileges and exemptions, in navigation and commerce, which native citizens or subjects do, or shall enjoy, submitting themselves, to the laws, decrees, and usages, there established, to which native citizens or subjects are subjected. But it is understood that this article does not include the coasting trade of either country, the regulation of which is reserved by the parties respectively, according to their own separate laws.

ART. 4th. They likewise agree that whatever kind of produce, manufactures, or merchandise, of any foreign country, can be, from time to time, lawfully imported into the United States, in their own vessels, may be also imported in vessels of Brazil: and that no higher or other duties upon the tonnage of the vessel and her cargo, shall be levied and collected, whether the importation be made in the vessels of the one country or the other. And in like manner, that whatever kind of produce manufactures, or merchandise of any foreign country, can be, from time to time, lawfully imported into the Empire of Brazil, in its own vessels, may be also imported in vessels of the United States: and that no higher or other duties upon the tonnage of the vessel and her cargo, shall be levied or collected whether the importation be made in vessels of the one country, or of the other. And they agree that whatever may be lawfully exported, or re-exported from the one country in its own vessels, to any foreign country, may in like manner, be exported or re-

exported in the vessels of the other country. And the same bounties, duties, and drawbacks, shall be allowed and collected, whether such exportation, or re-exportation, be made in vessels of the United States, or of the Empire of Brazil. The Government of the United States however considering the present state of the navigation of Brazil, agrees that a vessel shall be considered as Brazilian, when the Proprietor and Captain are subjects of Brazil and the papers are in legal form.

ART. 5th. No higher or other duties shall be imposed on the importation into the United States, of any articles the produce or manufactures of the Empire of Brazil, and no higher or other duties shall be imposed on the importation into the Empire of Brazil, of any articles the produce or manufactures of the United States, than are or shall be payable on the like articles, being the produce or manufactures of any other foreign country: nor shall any higher or other duties, or charges be imposed in either of the two countries, on the exportation of any articles to the United States, or to the Empire of Brazil respectively, than such as are payable on the exportation of the like article to any other foreign country: nor shall any prohibition be imposed on the exportation or importation of any articles, the produce or manufactures of the United States, or of the Empire of Brazil, to or from the territories of the United States, or to or from the territories of the Empire of Brazil, which shall not equally extend to all other nations.

ART. 6th. It is likewise agreed, that it shall be wholly free for all merchants, commanders of ships, and other citizens or subjects of both countries, to manage themselves their own business, in all the ports and places subject to the jurisdiction of each other, as well with respect to the consignment and sale of their goods and merchandise by wholesale or retail, as with respect to the loading,

unloading and sending off their ships: they being in all these cases to be treated as citizens or subjects of the country in which they reside, or at least to be placed on a footing with the subjects or citizens of the most favored nation.

ART. 7th. The citizens and subjects of neither of the contracting parties shall be liable to any embargo, nor be detained with their vessels, cargoes, or merchandise or effects, for any military expedition, nor for any public or private purpose whatever, without allowing to those interested a sufficient indemnification.

ART. 8th. Whenever the citizens or subjects of either of the contracting parties shall be forced to seek refuge or asylum in the rivers, bays, ports or dominions of the other, with their vessels whether of merchant or of war, public or private, through stress of weather, pursuit of pirates, or enemies, they shall be received and treated with humanity, giving to them all favor and protection, for repairing their ships, procuring provisions, and placing themselves in a situation to continue their voyage without obstacle or hindrance of any kind.

ART. 9th. All the ships, merchandise and effects belonging to the citizens or subjects, of one of the contracting parties, which may be captured by pirates, whether within the limits of its jurisdiction, or on the high seas, and may be carried, or found in the rivers, roads, ports, bays or dominions of the other, shall be delivered up to the owners, they proving in due and proper form, their rights before the competent tribunals: it being well understood, that the claim should be made within the term of one year by the parties themselves, their attorneys, or agents of their respective governments.

ART. 10th. When any vessel belonging to the citizens or subjects of either of the contracting parties, shall be wrecked, foundered, or shall suffer any damage on the

coasts, or within the dominions of the other, there shall be given to them all assistance and protection, in the same manner which is usual and customary with the vessels of the nation, where the damage happens, permitting them to unload the said vessel, if necessary, of its merchandise and effects, without exacting for it any duty, impost or contribution whatever, until they may be exported, unless they be destined for consumption.

ART. 11th. The citizens or subjects of each of the contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other, by sale, donation, testament or otherwise, and their representatives, being citizens or subjects of the other party, shall succeed to the said personal goods, whether by testament, or *ab intestato*, and they may take possession thereof, either by themselves, or others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country, wherein said goods are, shall be subject to pay in like cases: and if, in the case of real estate, the said heirs would be prevented from entering into the possession of the inheritance, on account of their character of aliens, there shall be granted to them the term of three years, to dispose of the same, as they may think proper, and to withdraw the proceeds without molestation, nor any other charges than those which are imposed by the laws of the country.

ART. 12th. Both the contracting parties promise and engage formally to give their special protection to the persons and property of the citizens and subjects of each other, of all occupations who may be in their territories, subject to the jurisdiction of the one or the other, transient or dwelling therein, leaving open and free to them the tribunals of justice for their judicial intercourse, on the same terms which are usual and customary, with the natives, or citizens and subjects of the country in which

they may be; for which they may employ, in defence of their rights, such advocates, solicitors, notaries, agents, and factors, as they may judge proper in all their trials at law.

ART. 13th. It is likewise agreed, that the most perfect and entire security of conscience shall be enjoyed by the citizens or subjects of both the contracting parties in the countries subject to the jurisdiction of the one and the other, without their being liable to be disturbed or molested on account of their religious belief, so long as they respect the laws and established usages of the country. Moreover, the bodies of the citizens and subjects of one of the contracting parties who may die in the territories of the other, shall be buried in the usual burying-grounds, or in other decent or suitable places, and shall be protected from violation or disturbance.

ART. 14th. It shall be lawful for the citizens and subjects of the United States of America, and of the Empire of Brazil, to sail with their ships, with all manner of liberty and security, no distinction being made who are the proprietors of the merchandise laden thereon, from any port to the places of those who now are, or who hereafter shall be at enmity with either of the contracting parties. It shall likewise be lawful for the citizens and subjects aforesaid, to sail with the ships and merchandises before mentioned, and to trade with the same liberty and security, from the places, ports, and havens, of those who are enemies of either party, without any opposition, or disturbance whatsoever, not only directly from the places of the enemy before mentioned, to neutral places, but also from one place belonging to an enemy to another place belonging to an enemy, whether they be under the jurisdiction of one power or under several. And it is hereby stipulated, that free ships shall also give freedom to goods, and that everything shall be deemed to be free, and exempt, which shall be found on board the ships belonging to the citizens or subjects of

either of the contracting parties, although the whole lading, or any part thereof should appertain to the enemies of either, contraband goods being always excepted. It is also agreed in like manner, that the same liberty be extended to persons who are on board a free ship, with this effect, that although they be enemies to both or either party, they are not to be taken out of that free ship, unless they are officers or soldiers, and in the actual service of the enemies: Provided however, and it is hereby agreed, that the stipulations in this article contained, declaring that the flag shall cover the property, shall be understood as applying to those powers only who recognize this principle; but if either of the two contracting parties shall be at war with a third, and the other neutral, the flag of the neutral shall cover the property of enemies whose governments acknowledge this principle, and not of others.

ART. 15th. It is likewise agreed, that in the case where the neutral flag of one of the contracting parties, shall protect the property of the enemies of the other, by virtue of the above stipulation, it shall always be understood, that the neutral property found on board such enemy's vessels, shall be held and considered as enemy's property, and as such shall be liable to detention and confiscation, except such property as was put on board, such vessel before the declaration of war, or even afterwards, if it were done without the knowledge of it; but the contracting parties agree that four months having elapsed after the declaration, their citizens shall not plead ignorance thereof. On the contrary, if the flag of the neutral, does not protect the enemies property, in that case the goods and merchandise of the neutral, embarked in such enemy's ship shall be free.

ART. 16th. This liberty of commerce and navigation shall extend to all kinds of merchandises, excepting those only which are distinguished by the name of contraband: and under this name of contraband, or prohibited goods, shall be comprehended—

1st. Cannons, mortars, howitzers, swivels, blunderbusses, muskets, fuzees, rifles, carbines, pistols, pikes, swords, sabres, lances, spears, halberds and grenades, bombs, powder, matches, balls, and all other things belonging to the use of these arms:

2d. Bucklers, helmets, breast plates, coats of mail, infantry belts; and clothes made up in the form and for a military use:

3d. Cavalry belts and horses with their furniture:

4th. And generally all kinds of arms and instruments of iron, steel, brass and copper, or of any other materials manufactured, prepared and formed expressly to make war by sea or land.

ART. 17th. All other merchandise and things not comprehended in the articles of contraband, expressly enumerated and classified as above, shall be held and considered as free, and subjects of free and lawful commerce, so that they may be carried and transported in the freest manner by both the contracting parties, even to places belonging to an enemy, excepting only those places which are at that time besieged or blockaded: and to avoid all doubt in this particular, it is declared, that those places only are besieged or blockaded, which are actually attacked by a force capable of preventing the entry of the neutral.

ART. 18th. The articles of contraband, before enumerated and classified, which may be found in a vessel bound for an enemy's port, shall be subject to detention and confiscation, leaving free the rest of the cargo and the ship, that the owners may dispose of them as they see proper. No vessel of either of the two nations shall be detained on the high seas, on account of having on board articles of contraband, whenever the master, captain or supercargo of said vessels will deliver up the articles of contraband to the captor, unless the quantity of such articles be so great, and

of so large a bulk, that they cannot be received on board the capturing ship without great inconvenience: but in this and all the other cases of just detention, the vessel detained shall be sent to the nearest convenient and safe port, for trial and judgment according to law.

ART. 19th. And whereas it frequently happens that vessels sail for a port or a place belonging to an enemy, without knowing that the same is besieged, blockaded, or invested, it is agreed, that every vessel so circumstanced, may be turned away from such port or place, but shall not be detained, nor shall any part of her cargo, if not contraband, be confiscated, unless, after warning of such blockade or investment from any officer commanding a vessel of the blockading forces, she shall again attempt to enter; but she shall be permitted to go to any other port or place, she shall think proper: Nor shall any vessel of either that may have entered into such port before the same was actually besieged, blockaded, or invested by the other, be restrained from quitting such place with her cargo, nor if found therein, after the reduction and surrender, shall such vessel or her cargo, be liable to confiscation, but they shall be restored to the owners thereof. And if any vessel having thus entered the port before the blockade took place, shall take on board cargo after the blockade be established, she shall be subject to being warned by the blockading forces to return to the port blockaded, and discharge the said cargo, and if after receiving the said warning the vessel shall persist in going out with the cargo, she shall be liable to the same consequences as a vessel attempting to enter a blockaded port after being warned off by the blockading forces.

ART. 20th. In order to prevent all kinds of disorder in the visiting and examination of the ships and cargoes of both the contracting parties on the high seas, they have agreed mutually, that whenever a vessel of war, public or private, shall meet with a neutral of the other contracting party, the first shall remain at the greatest distance compat

ible with making the visit under the circumstances of the sea and wind and the degree of suspicion attending the vessel to be visited, and shall send its smallest boat, in order to execute the said examination of the papers concerning the ownership and cargo of the vessel, without causing the least extortion, violence, or ill treatment, for which the commanders of the said armed ships, shall be responsible with their persons and property; for which purpose the commanders of the said private armed vessels shall, before receiving their commissions, give sufficient security to answer for all the damages they may commit; and it is expressly agreed, that the neutral party shall in no case be required to go on board the examining vessel, for the purpose of exhibiting her papers, or for any other purpose whatever.

Art. 21st. To avoid all kind of vexation and abuse in the examination of the papers relating to the ownership of the vessels belonging to the citizens and subjects of the two contracting parties, they have agreed, and do agree, that in case one of them shall be engaged in war, the ships and vessels belonging to the citizens or subjects of the other must be furnished with sea letters or passports, expressing the name, property and buik of the ship as also the name and place of habitation of the master or commander of said vessel, in order that it may thereby appear, that the ship really and truly belongs to the citizens or subjects of one of the parties; they have likewise agreed, that such ships being laden, besides the said sea letters or passports, shall also be provided with certificates, containing the several particulars of the cargo, and the place whence the ship sailed, so that it may be known whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship sailed, in the accustomed form; without such requisites said vessel may be detained, to be adjudged by the competent tribunal, and may be declared legal prize, unless the said defect shall be

proved to be owing to accident, and be satisfied or supplied by testimony entirely equivalent.

ART. 22d. It is further agreed that the stipulations above expressed, relative to the visiting and examining of vessels, shall apply only to those which sail without convoy; and when said vessel shall be under convoy, the verbal declaration of the commander of the convoy, on his word of honor, that the vessels under his protection belong to the nation whose flag he carries; and when they are bound to an enemy's port, that they have no contraband goods on board, shall be sufficient.

ART. 23. It is further agreed that in all cases the established Courts for prize causes, in the countries to which the prizes may be conducted, shall alone take cognizance of them. And whenever such tribunal of either party, shall pronounce judgment against any vessel, or goods, or property claimed by the citizens or subjects of the other party, the sentence or decree shall mention the reasons or motives, on which the same shall have been founded, and an authenticated copy of the sentence or decree, and of all the proceedings in the case, shall if demanded, be delivered to the commander or agent of said vessel, without any delay, he paying the legal fees for the same.

ART. 24th. Whenever one of the contracting parties shall be engaged in war with another State, no citizen or subject of the other contracting party, shall accept a commission, or letter of marque, for the purpose of assisting or cooperating hostilely, with the said enemy, against the said party so at war, under the pain of being treated as a pirate.

ART. 25th. If by any fatality, which cannot be expected, and which God forbid, the two contracting parties should be engaged in a war with each other, they have agreed, and do agree, now for then, that there shall be allowed the term of six months to the merchants residing on the coasts and in the ports of each other, and the terms of one year to those

who dwell in the interior, to arrange their business, and transport their effects wherever they please, giving to them the safe conduct necessary for it, which may serve as a sufficient protection until they arrive at the designated port. The citizens and subjects of all other occupations, who may be established in the territories or dominions of the United States and of the Empire of Brazil, shall be respected and maintained in the full enjoyment of their personal liberty and property, unless their particular conduct shall cause them to forfeit this protection, which in consideration of humanity, the contracting parties engage to give them.

ART. 26th. Neither the debts due from the individuals of the one nation, to the individuals of the other, nor shares nor money which they may have in public funds, nor in public nor private banks, shall ever in any event of war or national difference be sequestrated or confiscated.

ART. 27th. Both the contracting parties being desirous of avoiding all inequality in relation to their public communications and official intercourse, have agreed and do agree, to grant to their envoys, Ministers, and other public Agents, the same favors, immunities and exemptions, which those of the most favored nation do, or shall enjoy; it being understood that whatever favors, immunities or privileges, the United States of America or the Empire of Brazil may find it proper to give the Ministers and Public Agents of any other power, shall, by the same act, be extended to those of each of the contracting parties.

ART. 28th. To make more effectual the protection which the United States and the Empire of Brazil shall afford in future to the navigation and commerce of the citizens and subjects of each other, they agree to receive and admit Consuls and Vice-Consuls in all the ports open to foreign commerce, who shall enjoy in them all the rights, prerogatives, and immunities, of the Consuls and Vice-Consuls of the most favored nation; each contracting party

however, remaining at liberty to except those ports and places in which the admission and residence of such Consuls may not seem convenient.

ART. 29th. In order that the Consuls and Vice-Consuls of the two contracting parties, may enjoy the rights, prerogatives, and immunities, which belong to them, by their public character, they shall before entering on the exercise of their functions, exhibit their commissions or patent in due form, to the Government to which they are accredited; and having obtained their *exequatur*, they shall be held and considered as such, by all the authorities magistrates, and inhabitants, in the Consular district in which they reside.

ART. 30th. It is likewise agreed, that the Consuls, their Secretaries, officers, and persons attached to the service of Consuls, they not being citizens or subjects of the country, in which the Consul resides, shall be exempt from all public service, and also from all kinds of taxes, imposts and contributions, except those which they shall be obliged to pay on account of commerce, or their property, to which the citizens or subjects and inhabitants, native and foreign, of the country in which they reside are subject; being in everything besides subject to the laws of their respective States. The archives and papers of the Consulate shall be respected inviolably, and under no pretext whatever shall any magistrate seize or in any way interfere with them.

ART. 31st. The said Consuls shall have power to require the assistance of the authorities of the country, for the arrest, detention, and custody of deserters from the public and private vessels of their country, and for that purpose they shall address themselves to the courts, judges, and officers competent, and shall demand the said deserters in writing, proving by an exhibition of the registers of the vessels or ships roll, or other public documents that those men were part of said crews; and on this demand so proved, (saving however, where the contrary is proved) the delivery

shall not be refused. Such deserters, when arrested, shall be put at the disposal of said Consuls, and may be put in the public prison, at the request and expense of those who reclaim them, to be sent to the ships to which they belonged, or to others of the same nation. But if they be not sent back within two months, to be counted from the day of their arrest, they shall be set at liberty, and shall no more be arrested for the same cause.

ART. 32. For the purpose of more effectually protecting their commerce and navigation, the two contracting parties do hereby agree, as soon hereafter, as circumstances will permit them, to form a consular convention, which shall declare specially the powers and immunities of the Consuls and Vice-Consuls of the respective parties.

ART. 33d. The United States of America, and the Emperor of Brazil desiring to make as durable as circumstances will permit, the relations which are to be established between the two parties by virtue of this Treaty, or General Convention of Peace, Amity, Commerce and Navigation, have declared solemnly and do agree to the following points:

First. The present treaty shall be in force for twelve years from the date hereof, and further until the end of one year after either of the contracting parties shall have given notice to the other, of its intention to terminate the same: each of the contracting parties reserving to itself the right of giving such notice to the other, at the end of said term of twelve years: and it is hereby agreed between them, that on the expiration of one year after such notice shall have been received by either, from the other party, this treaty, in all the parts relating to commerce and navigation, shall altogether cease and determine, and in all those parts which relate to peace and friendship, it shall be permanently and perpetually binding on both powers.

Secondly. If any one or more of the citizens or subjects of either party shall infringe any of the articles of this Treaty, such citizen or subject shall be held personally responsible for the same, and the harmony and good correspondence between the nations shall not be interrupted thereby; each party engaging in no way to protect the offender, or sanction such violation.

Thirdly. If (which indeed cannot be expected) unfortunately, any of the articles contained in the present Treaty, shall be violated or infringed in any way whatever, it is expressly stipulated, that neither of the contracting parties will order or authorize any acts of reprisal, nor declare war against the other, on complaints of injuries or damages until the said party considering itself offended, shall first have presented to the other a statement of such injuries or damages, verified by competent proof, and demanded justice and satisfaction, and the same shall have been either refused or unreasonably delayed.

Fourthly. Nothing in this Treaty contained shall however, be construed, to operate contrary to former and existing public Treaties with other Sovereigns or States.

The present Treaty of Peace, Amity, Commerce, and Navigation, shall be approved and ratified by the President of the United States by and with the advice and consent of the Senate thereof and by the Emperor of Brazil, and the ratifications shall be exchanged within eight months from the date of the signature hereof, or sooner if possible.

In faith whereof we, the Plenipotentiaries of the United States of America and of His Majesty the Emperor of Brazil, have signed and sealed these presents.

Done in the City of Rio de Janeiro, this twelfth day of the month of December in the year of our Lord Jesus Christ one thousand eight hundred and twenty eight.

[SEAL.] W. TUDOR.
[SEAL.] MARQUEZ DE ARACATY
[SEAL.] MIGUEL DE SOUZA MELLO E ALVIM

And whereas the said Treaty or General Convention has been duly ratified on both parts, and the respective Ratifications of the same have, this day, been exchanged, at Washington, by James A Hamilton, Acting Secretary of State of the United States, and the Chevalier Je. Silvestre Rebello, Chargé d'Affaires of His Majesty the Emperor of Brazil, on the part of their respective Governments;

Now, therefore, be it known, that I, Andrew Jackson, President of the United States of America, have caused the said Treaty or General Convention to be made public, to the end that the same, and every clause and article thereof, may be observed and fulfilled with good faith, by the United States, and the citizens thereof.

In witness whereof I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the City of Washington, this eighteenth day of March, in the year of Our Lord, one thousand eight hundred and twenty-nine, and of

[L. S.] the Independence of the United States, the Fifty-third.

Andrew Jackson

By the President.

JAMES A. HAMILTON

Acting Secretary of [*State*]

TREATY SERIES, No. 815

STATUS OF ALIENS

CONVENTION

BETWEEN

THE UNITED STATES OF AMERICA AND OTHER AMERICAN REPUBLICS

Signed at Habana, February 20, 1928.

Ratification advised by the Senate, with exception of Articles 3 and 4, April 16, 1930 (legislative day of April 14, 1930).

Ratified by the President, May 7, 1930.

Ratification of the United States of America deposited with the Pan American Union, May 21, 1930.

Proclaimed, June 6, 1903.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS, a Convention regarding the status of aliens in their respective territories was adopted in the English, Spanish, Portuguese and French languages at the Sixth International Conference of American States at Habana on February 20, 1928, by the Plenipotentiaries of the United States of America under reservation of its Article 3, and by the respective Plenipotentiaries of Peru, Uruguay, Panama, Ecuador, Mexico, El Salvador, Guatemala, Nicaragua, Bolivia, Venezuela, Colombia, Honduras, Costa Rica, Chile, Brazil, Argentina, Paraguay, Haiti, the Dominican Republic, and Cuba, the English text of which Convention, as contained in the Final Act signed by the Plenipotentiaries of the said States at the closing session of the said Conference, is word for word as follows:

CONVENTION

[STATUS OF ALIENS]

The Governments of the Republics represented at the Sixth International Conference of American States, held in the city of Habana, Republic of Cuba, in the year 1928:

Have decided to conclude a convention for the purpose of determining the status of aliens within their respective territories and to that end have appointed the following plenipotentiaries:

Perú: Jesús Melquiades Salazar, Victor Maúrtua, Enrique Castro Oyanguren, Luis Ernesto Denegri.

Uruguay: Jacobo Varela Acevedo, Juan José Amézaga, Leonel Aguirre, Pedro Erasmo Callorda.

Panamá: Ricardo J. Alfaro, Eduardo Chiari.

Ecuador: Gonzalo Zaldumbide, Victor Zevallos, Colón Eloy Alfaro.

Mexico: Julio García, Fernando González Roa, Salvador Urbina, Aquiles Elorduy.

Salvador: Gustavo Guerrero, Héctor David Castro, Eduardo Alvarez.

Guatemala: Carlos Salazar, Bernardo Alvarado Tello, Luis Beltranena, José Azurdia.

Nicaragua: Carlos Cuadra Pazos, Joaquín Gómez, Máximo H. Zepeda.

Bolivia: José Antezana, Adolfo Costa du Rels.

Venezuela: Santiago Key Ayala, Francisco Gerardo Yanes, Rafael Angel Arraiz.

Colombia: Enrique Olaya Herrera, Jesús M. Yepes, Roberto Urdaneta Arbeláez, Ricardo Gutiérrez Lee.

Honduras: Fausto Dávila, Mariano Vázquez.

Costa Rica: Ricardo Castro Beeche, J. Rafael Oreamuno, Arturo Tinoco.

Chile: Alejandro Lira, Alejandro Alvarez, Carlos Silva Vildósola, Manuel Bianchi.

Brazil: Raúl Fernandes, Lindolfo Collor, Alarico da Silveira, Sampaio Correa, Eduardo Espínola.

Argentina: Honorio Pueyrredón, (Later resigned), Laurentino Olascoaga, Felipe A. Espil.

Paraguay: Lisandro Díaz León.

Haiti: Fernando Dennis, Charles Riboul.

Dominican Republic: Francisco J. Peynado, Gustavo A. Díaz, Elías Brache, Angel Morales, Tulio M. Cestero, Ricardo Pérez Alfonseca, Jacinto R. de Castro, Federico C. Alvarez.

United States of America: Charles Evans Hughes, Noble Brandon Judah, Henry P. Fletcher, Oscar W. Underwood, Dwight W. Morrow, Morgan J. O'Brien, James Brown Scott, Ray Lyman Wilbur, Leo S. Rowe.

Cuba: Antonio S. de Bustamante, Orestes Ferrara, Enrique Hernández Cartaya, José Manuel Cortina, Arístides Agüero, José B. Alemán, Manuel Márquez Sterling, Fernando Ortiz, Néstor Carbonell, Jesús María Barraqué.

Who, after depositing their full powers, which were found to be in good and due form, have agreed upon the following provisions:

ARTICLE 1

States have the right to establish by means of laws the conditions under which foreigners may enter and reside in their territory.

ARTICLE 2

Foreigners are subject as are nationals to local jurisdiction and laws, due consideration being given to the limitations expressed in conventions and treaties.

ARTICLE 3[1]

Foreigners may not be obliged to perform military service; but those foreigners who are domiciled, unless

they prefer to leave the country, may be compelled, under the same conditions as nationals, to perform police, fire-protection, or militia duty for the protection of the place of their domicile against natural catastrophes or dangers not resulting from war.

ARTICLE 4[1]

Foreigners are obliged to make ordinary or extraordinary contributions, as well as forced loans, always provided that such measures apply to the population generally.

ARTICLE 5

States should extend to foreigners, domiciled or in transit through their territory, all individual guaranties extended to their own nationals, and the enjoyment of essential civil rights without detriment, as regards foreigners, to legal provisions governing the scope of and usages for the exercise of said rights and guaranties.

ARTICLE 6

For reasons of public order or safety, states may expel foreigners domiciled, resident, or merely in transit through their territory.

States are required to receive their nationals expelled from foreign soil who seek to enter their territory.

ARTICLE 7

Foreigners must not mix in political activities, which are the exclusive province of citizens of the country in which they happen to be; in cases of such interference, they shall be liable to the penalties established by local law.

ARTICLE 8

The present convention does not affect obligations previously undertaken by the contracting parties through international agreements.

[1] Articles 3 and 4 excepted from ratification by the United States of America. See page 5.—EDITOR.

ARTICLE 9

After being signed, the present convention shall be submitted to the ratification of the signatory states. The Government of Cuba is charged with transmitting authentic certified copies to the governments for the aforementioned purpose of ratification. The instrument of ratification shall be deposited in the archives of the Pan American Union in Washington, the Union to notify the signatory governments of said deposit. Such notification shall be considered as an exchange of ratifications. This convention shall remain open to the adherence of nonsignatory states.

In witness whereof, the aforenamed plenipotentiaries sign the present convention in Spanish, English, French, and Portuguese, in the city of Hábana, the 20th day of February, 1928.

Peru: Jesús M. Salazar, Víctor M. Maúrtua, Luis Ernesto Denegri, E. Castro Oyanguren.

Uruguay: Varela, Pedro Erasmo Callorda.

Panamá: R. J. Alfaro, Eduardo Chiari.

Ecuador: Gonzalo Zaldumbide, Víctor Zevallos, C. E. Alfaro.

Mexico: Julio García, Fernando González Roa, Salvador Urbina, Aquiles Elorduy.

Salvador: J. Gustavo Guerrero, Héctor David Castro, Ed. Alvarez.

Guatemala: Carlos Salazar, B. Alvarado, Luis Beltranena, J. Azurdia.

Nicaragua: Carlos Cuadra Pazos, Máximo H. Zepeda, Joaquín Gómez.

Bolivia: José Antezana, A. Costa du R.

Venezuela: Santiago Key Ayala, Francisco G. Yanes, Rafael Angel Arraiz.

Colombia: Enrique Olaya Herrera, R. Gutiérrez Lee, J. M. Yepes.

Honduras: F. Dávila, Mariano Vázquez.

Costa Rica: Ricardo Castro Beeche, J. Rafael Oreamuno, A. Tinoco Jiménez.

Chile: Alejandro Lira, Alejandro Alvarez, C. Silva Vildósola, Manuel Bianchi.

Brazil: Raúl Fernandes, Lindolfo Collor.

Argentina: Laurentino Olascoaga, Felipe A. Espil, Carlos Alberto Alcorta.

Paraguay: Lisandro Díaz León, Juan Vicente Ramírez.

Haiti: Fernando Dennis.

Dominican Republic: Fraco. J. Peynado, Tulio M. Cestero, Jacinto R. de Castro, Elías Brache, R. Pérez Alfonseca.

Reservation of the Delegation of the United States of America

The delegation of the United States of America signs the present convention making express reservation to Article 3 of the same, which refers to military service of foreigners in case of war.

United States of America: Charles Evans Hughes, Noble Brandon Judah, Henry P. Fletcher, Oscar W. Underwood, Morgan J. O'Brien, James Brown Scott, Ray Lyman Wilbur, Leo S. Rowe.

Cuba: Antonio S. de Bustamante, Orestes Ferrara, E. Hernández Cartaya, Arístides de Agüero Bethencourt, M. Márquez Sterling, Néstor Carbonell.

Certified to be the English text of the Convention on Status of Aliens as contained in the Final Act signed at the Closing session of the Sixth International Conference of American States.

FRANK B KELLOGG

Secretary of State of the United States of America.

AND WHEREAS, the said Convention, with the exception of Articles 3 and 4 thereof, has been duly ratified on the part of the United States of America and the instrument of ratification by the United States of America was deposited with the Pan American Union on May 21, 1930;

AND WHEREAS, the said Convention has been ratified also by the Governments of Panama, Brazil and Nicaragua, and the instruments of ratification of the said Governments were deposited with the Pan American Union on May 21, 1929, September 3, 1929, and March 20, 1930, respectively;

NOW, THEREFORE, BE IT KNOWN THAT I, HERBERT HOOVER, President of the United States of America, have caused the said Convention to be made public, to the end that the same and every article and clause thereof, with the exception of Articles 3 and 4, may be observed and fulfilled with good faith by the United States of America and the citizens thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the city of Washington this sixth day of June in the year of our Lord one thousand nine
[SEAL] hundred and thirty, and of the independence of the United States of America the one hundred and fifty-fourth.

HERBERT HOOVER

By the President:
HENRY L. STIMSON
Secretary of State.

IN THE

Supreme Court of the State of Delaware

JAN A. BATA

Defendant Below,
Appellant

v.

THOMAS J. BATA; THOMAS J. BATA and DAVID GRAHAM, as Executors of the Estate of Mary T. Bata; and WESTERN INVESTMENT AND TRADING COMPANY, LIMITED, a Bermuda Corporation

Plaintiffs Below
Appellees

No. 48, 1958
Term

PETITION FOR REARGUMENT

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IN THE

Supreme Court of the State of Delaware

JAN A. BATA,

Defendant Below, Appellant,

v.

THOMAS J. BATA; THOMAS J. BATA and DAVID GRAHAM, as Executors of the Estate of Mary T. Bata; and WESTERN INVESTMENT AND TRADING COMPANY LIMITED, a Bermuda Corporation,

Plaintiffs Below, Appellees.

No. 48, 1958 Term

CERTIFICATE OF COUNSEL.

GEORGE T. COULSON and HAROLD E. STASSEN, of counsel for Jan A. Bata, Defendant-Appellant, Petitioner, do certify to the Supreme Court of Delaware that the Petition for Reargument herein is presented in good faith and not for delay.

This Certificate is presented in accordance with Rule 13 of the Rules of the Supreme Court of Delaware

George T. Coulson

Harold E. Stassen

January 16, 1961

IN THE

Supreme Court of the State of Delaware

JAN A. BATA,

Defendant Below,
Appellant,

v.

THOMAS J. BATA; THOMAS J. BATA and DAVID GRAHAM, as Executors of the Estate of Mary T. Bata; and WESTERN INVESTMENT AND TRADING COMPANY LIMITED, a Bermuda Corporation,

Plaintiffs Below,
Appellees.

No. 48, 1958 Term

PETITION FOR REARGUMENT

Defendant below, Appellant Jan A. Bata, acting within the time enlarged by order of the Court, respectfully petitions for a reargument on the following grounds:

I. NO JURISDICTION FOR COLLATERAL ATTACK

The Czechoslovakian Probate Proceedings, Administration, and Disposition of the Estate of Thomas Bata in 1932 and 1933 was an *in rem* proceedings, administration, and disposition in a court of competent jurisdiction under a government recognized by the Government of the United States.

These Czechoslovakian Probate Proceedings, Administration and Disposition established the ownership and title of the Shares of Leader A.G. in Jan A. Bata.

It is the settled law of the United States under the decisions of the United States Supreme Court that the courts of the states and of the United States are without jurisdiction to attack collaterally these *in rem* Czechoslovakian Probate Proceedings, Administration, and Disposition of the Estate of Thomas Bata.

The instant opinion of the Delaware Supreme Court includes and is based upon a collateral attack upon these *in rem* Czechoslovakian Probate Proceedings, Administration and Disposition of the Estate of Thomas Bata and is therefore a nullity for lack of jurisdiction. The New York decision is also a nullity for lack of jurisdiction.

The shares of Leader A.G. and of Westhold Corporation and North River Securities Corporation now in the custody of the receiver appointed by the Chancellor in the Court below are the property of Jan A. Bata and should be delivered to him. This is a matter of jurisdiction that may be raised at any stage of the proceedings.

Authorities for the Rule Against Collateral Attack

The applicable law of the United States was enunciated early in our history by the great Chief Justice John Marshall in *Williams* v. *Amroyd*, 11 U. S. (7 Cranch) 423, (1813). Chief Justice Marshall said, at page 432:

> "The sentence of a competent court, proceeding *in rem*, is conclusive with respect to the thing itself, and operates as an absolute change of the property."

Chief Justice Marshall further stated:

> "No Court of coordinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law can never arise, for no coordinate tribunal is capable of making the inquiry."

This statement of the law of the United States has been followed in an unbroken line of decisions. These include a decision expressed with clarity by Justice Oliver Wendell Holmes who set forth the same rule in *Hapai* v. *Brown*, 239 U. S. 502, (1916). The case involved a bill to quiet title to a large tract of land in Hawaii. Justice Holmes said at page 504:

"But as we cannot doubt the import of the decree when rendered, we are narrowed in our inquiry to the question of jurisdiction in an accurate sense. Unless we are prepared to pronounce the decree void for want of power to pass it and open to collateral attack, the decision in this case must stand."

The rule applies to judgments *in rem* under municipal law. *Ennis* v. *Smith*, 55 U. S. (14 How.) 400 (1852); *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 291 (1887); *Scott* v. *McNeal*, 154 U. S. 34, 46 (1893); *Hilton* v. *Guyot*, 139 U. S. 113, 167 (1895).

The rule also applies to decisions of Courts of admiralty and prize, which proceed upon principles of international law. *Ludlow* v. *Dale*, 1 Johns. Cas. 16.

Probate proceedings are *in rem* proceedings. *Christianson* v. *King County*, 239 U. S. 356, 373 (1915).

Such proceedings cannot be collaterally attacked. *Doran* v. *Kennedy*, 237 U. S. 362 (1915).

The Courts of England have gone so far as to say that no British Court may collaterally attack a judgment *in rem* of a foreign court even though it affirmatively appears that a person seeking to impeach the foreign judgment has a preferential title under the law of England. *Castique* v. *Imbrie*, L. R. 4 H. L. 414; or even though the document probated in a probate proceeding was actually a forgery, so long as the probate decree remained unrepealed in the probate courts. *Allen* v. *Dundas*, 3 T. R. 125.

The Essential Reasons for the Rule Against Collateral Attack

Reflection indicates the sound logic and indispensable requirement that this be the settled law. To hold otherwise would introduce an element of disrupting and continuing uncertainty into the title of movable property and would repeatedly place upon courts the illogical and virtually impossible task of trying the facts without the availability of the most important and impartial witnesses,

and of deciding the law of foreign jurisdictions conducted under different systems of jurisprudence.

It is respectfully submitted that the instant case is a striking example of the soundness of the rule of law that proceedings *in rem* cannot be attacked collaterally and that courts of the states and of the United States are without jurisdiction to attempt to do so.

In the instant Delaware case and in the New York case brought by the same plaintiffs, an endeavor has been made to open up and redetermine the 1932-1933 proceedings, administration and disposition of the estate of Thomas Bata; after an intervening World War resulted in first an occupation of Czechoslovakia by the Nazis and then a takeover by the Communists and the consequent barring of the defendant-appellant from access to Czechoslovakia; after three of the best informed witnesses have died, Frank Muska the key financial administrator who personally handled the shares and related transactions, Dr. Georg Wettstein, the veritable general counsel of international operations and organizer of Leader A.G., and Miss Lazla, Mr. Muska's private secretary; without the availability of the complete and original records of the probate proceedings, administrations, and disposition; and, in a jurisdiction not within the civil law system followed in 1932 and 1933 by Czechoslovakia.

The Application of the Rule Against Collateral Attack

Applying this settled principle of the law of the United States to the instant case leads through this reasoning to these conclusions:

At his death on July 12, 1932 Thomas Bata was a citizen of Czechoslovakia and a resident of Zlin in Czechoslovakia.

The probate court of Zlin in Czechoslovakia was the competent court with jurisdiction over his estate.

Thomas J. Bata, Mary T. Bata, and Jan A. Bata were all citizens and residents of Czechoslovakia in 1931, 1932, 1933, and until 1939, and all participated in the probate

proceedings, administration and disposition of the estate of Thomas Bata.

Upon his death Thomas Bata left two personally signed documents in his own handwriting in the Czechoslovakian language in his personal safe next to each other.

The May 10th, 1931 Document

The first document was dated May 10, 1931 and was in an envelope addressed to defendant-appellant Jan A. Bata. (Defendant's Exhibit 71.)

It is reproduced (omitting the additions made after the death of the deceased) in the approved English translation as follows:

on 5/10 1931

"I, the undersigned Tomas Bata sell to you J. A. Bata and you purchase from me all shares of Bata akc. spol. Zlin as well as all shares of the construction company 'Zlin' then all shares of the company 'Tisk' then participations in the Libstat establishments.

Of foreign companies I sell to you the following shares or participations:

Company, Bata Schuh Aktiengesellschaft Zurich nominal value frc. 450,000.

Bata Matschapai	Amsterdam	51,000 Hol. fl.
Bave "	"	20,000 Hol. fl.
Bata Cipele i koze	Zagreb	2,100,000 Dinars
Bata	Krakov	100,000 Zl.
Bata	Bukarest	2,000,000 Lei
Bata	Alexandria	2,250 £
Bata	Copenhagen	400,000 D. Kr
Bata	Strasbourg	600,000 Frc.

"From the sold property is further excluded the (ex- debt which we have against the city in the amount of approx. 4,300,000 that is by such amount the purchase price is increased and J. A. Bata is under obligation to pay such amount to the city of Zlin. (signed) Tomas Bata"

(second page)

Bata	Stockholm	40,000 Kr
Bata Deutsche Schuhe A.G.	Berlin	110,000 Rm.
Bata	Vienna	20,000 S.
Bata Shoe & Leather	Lynn	15,000 $
Bata "	New York	400,000 $

I sell to you shares

Further also of domestic companies

Bapoz spol. s.r.o.		400,000 Kc
Paris akc. spol		500,000 Kc
Atlas insur.		3,000,000 Kc
Busi	Trebic	10,000,000 Kc
Budisovsky	Trebic	10,800,000 Kc

From these values I ~~exclude~~ is excluded the landed property Loucka a Lazy as well as my residential house in Zlin

Besides these enumerated values ~~included are in the sale~~ I sell to you all my property even if it is not enumerated here for the amount of Kč 50,000,000 fifty million K.c. Czechoslovak currency.

You are under obligation to pay this purchase price in cash within one year from taking over the companies and to pay 5% interest pro ano.

(signed) Tomas Bata."

"From the sold property is further excluded the debt which we have against the city in the amount of approx. 4,300,000 that is by such amount the purchase price is increased and J. A. Bata is under obligation to pay such amount to the city of Zlin. (signed) Tomas Bata"

The May 19th 1931 document

The second document was dated May 19, 1931 and was in envelope labelled "My Last Will". (Defendant's Exhibit 74.)

It is reproduced in the approved English translation as follows:

"My last will:

Made on the day 19/5 1931
My property as of today
consists of
Claim against J. A. Bata
of
for all shares sold xx

domestic and foreign comp.	Kc 50,000,000
My dwelling house in Zlin	100,000
Landed estates Loucka and Lazy and Schmergerle	3,000,000
Claim against the City of Zlin—About	4,300,000
	57,400,000

From this my property I bequeath

To my wife Mrs. Marie Bata	
Landed estates Loucka Lazy Scmergerle	3,100,000
Further in cash	Kc 5,000,000
To my son Tom Bata his legal quota	Kc 22,000,000
with the provision that this his property shall be administered by his mother until he reaches 22 years of age. The proceeds shall be used for his education and the remainder shall be deposited for his benefit.	
	30,100,000

(second page)

Carried forward	30,100,000
To my sister Anna Schiebel I bequeath	1,500,000
To the City of Zlin the debt	4,300,000
with Bata a.s. J. A. Bata will pay	
The balance	Kč 21,500,000

I give to my fellow workers 57,400,000
is to be paid
~~is payable~~ within 5 years with 5% interest
This amount ~~is to be paid in cash~~ to the Bata Workers Benevol
Fund and is to be administered in the spirit of the now effective by-laws.

It is understood that I have drawn up this last will with full understanding being of sound mind and without duress and in my own handwriting.

/s/ Tomas Bata

My previous testament hereby naturally loses its validity.

/s/ Tomas Bata"

After the death of the deceased on July 12, 1932 both documents were turned over to the custody of Dr. Hugo Foerster, probate court commissioner and notary public.

On the May 10, 1931 document these writings were added after death.

"(signed) Dr. Hugo Foerster
Notary
In our presence on 7/12,32
opened by J. A. Bata

(signed) Dr. A. Mencik
(signed) Cipera
(signed) Varecka"

As this Court stated in its opinion "at the suggestion of Dr. Foerster, Jan wrote the document: 'I agree and purchase, Jan A. Bata' on the next day Jan added the words: 'that is to say, I agreed and purchased as per oral agreement'." As noted above, Dr. Foerster was the Probate Court Commissioner.

Dr. A. Mencik was the brother of Mary Bata and the uncle of the plaintiff Tom Bata in this action.

Cipera was the principal financial officer of the domestic Bata companies and was also a relative of the plaintiffs herein.

Vavrecka was a principal officer of the Bata company and also a relative of the plaintiffs herein.

On the May 19th document the following endorsement was added after the death of Thomas Bata:

"Published at the District Court in Zlin on the 13th day of July 1932

(signed) Loucka Bohumil"

The seal of the District Court in Zlin was affixed.

Legal effect of two documents determined in Czechoslovakia

This Delaware Court stated in the instant opinion that "The legal effect of these two papers is the question at the heart of this controversy, * * *"

It is respectfully submitted that the legal effect of these two papers was within the competent jurisdiction of the Probate Court (District Court) at Zlin, Czechoslovakia, to determine. That Probate Court did determine the legal effect of these two papers with full participation in the proceedings by Mary T. Bata, Thomas J. Bata, and Jan A. Bata.

That court did determine that "all shares" and "all my property even if it is not enumerated" was to go to Jan Bata, as testator's handwritten documents plainly said, and that Jan Bata was to provide the substitute estate of fifty million Kronen plus the four million three hundred thousand Kronen for the City of Zlin item. That determination was final and it was fulfilled.

The record is conclusive that the Probate Court at Zlin, Czechoslovakia determined that these two documents encompassed the entire estate of the deceased Thomas Bata, that these two documents clearly stated the intent and wish of Thomas Bata for the disposition of his estate, that all of the shares and all of the property of the deceased were to be in the ownership of Jan A. Bata; that his widow, his son, his sister, his employees, and his community should each receive the substantial cash bequests and homes and real estate which the deceased had specified; and that his pervading concern was that the Bata business enterprises should survive and be carried forward successfully under enlightened and public spirited policies which he set forth in another undated memorandum to accompany his will, and which was also published in Probate Court.

The Probate Court specifically expressed this interpretation and determination in the certificate (Defendant's

Exhibit 71) issued to be used for the transferring of certain of the registered shares. This certificate was issued during the probate proceedings and prior to the June 28, 1933 deed of delivery in the probate proceedings, approved translations of pertinent parts of which are as follows: (Defendant's Exhibit 160) (After quoting a part of the May 10, 1931 document)

"*Official Certificate*

The DISTRICT COURT of ZLIN as the Court of Justice competent to deal with and to wind up and distribute the Estate of Thomas BATA late of ZLIN, Manufacturer, deceased on the 12th of July 1932 HEREBY CERTIFIES THAT the annexed certified copy of an instrument dated the 10th day of May 1931 inter alia legally arranges the transfer of ownership in respect of shares of the BATA SHOE Co. New York to Mr. John A. Bata, Manufacturer of ZLIN, and that by virtue and under said instrument Mr. J. A. BATA has, according to the Laws of Czechoslovakia, the right to claim that said shares be transferred and entered in his name.

The District Court of Justice at ZLIN, Division I. on this 28th day of April 1933.

L.S. Signed Dr. KLENNER

"I HEREBY CERTIFY THAT the foregoing extract agrees entirely with the respective passages of a certified copy of an instrument dated the 10th of May 1931 and also with the original Official Certificate attached to the foregoing certified copy.

GIVEN at ZLIN, on this tenth day of May of the year One thousand nine hundred and thirty three. :10. V. 1933 :/.

Signed Dr. Hugo Forster.
Notary Public."

The Probate Court also likewise approved specifically of the transfer of the Tisk registered shares to Jan A. Bata, as reported in the summary of the proceedings. (Defendant's Exhibit 98, at item labelled pages 45, 46, 47)

The Fulfillment of Jan's Obligation

In addition, the Probate Court thereafter approved of the transfer of the obligation by Jan A. Bata under the May documents to an obligation of Bata a.s., the home corporation of Bata. This acceptance of an obligation of the corporation by the Probate Court, and by the corporation at Jan Bata's discretion, reflected definitely the ownership of the Bata a.s. corporation by Jan A. Bata and the fulfillment of Jan's obligation. (Defendant's Exhibit 90, at page 3 thereof). This probate action was a recognition and probate determination that the shares and all of the property of the deceased Thomas Bata had been transferred to the ownership of Jan Bata, and that Jan had fulfilled his obligation under the documents left by Thomas. Thomas J. Bata and Marie Bata signed their approval to this proceeding and determination.

The Probate Court based the final deed of delivery directly upon the proceeds of the May 10th document written by the deceased, and distributed these proceeds in accordance with the May 19th document written by the deceased. (Defendant's Exhibit 95)

The probate Court at Zlin on June 28, 1933 entered an order which unequivocally accepts and substitutes the 50,000,000 Kroner claim against Jan Bata, plus the personal real estate and home items and the City of Zlin item, or a total of 57,262,131 Kroner, for the entire shares and property of the deceased. (Defendants Exhibit 96)

The text of this order in the approved English translation is, as follows:

"**Order**

Estate of Thomas Bata, industrialist in Zlin, deceased on July 12, 1932, leaving a last will and testament.

"The statutory unconditional declaration of acceptance of the inheritance of the surviving spouse Marie Batova and of the surviving son Thomas Bata has been accepted by court's order of June 8, 1933 index no. D 297/32-48.

"The statement in lieu of oath listing the property will be the basis of winding up the estate. According to it there are:

I assets ..... Kc 57,262.131—
II debts of the estate : ..... — —
III. The net estate is..... Kc 57,262.131—

"The schedule of estate's assets is being forwarded to the revenue authorities for assessment of estate taxes."

District Court in Zlin, Department I.,
June 28, 1933.

Dr. Klenner

Copy to
1/Mrs. Marie Batova, Zlin no. 292
2/notary public."

The precise confirmation of the conclusive relationship of the foregoing order to the May 10th document and the May 19th document is evidenced by the following quotation from the official record of hearing of June 23, 1933 in the Probate Court at the first paragraph of page three of the English translation thereof (Defendant's Exhibit 90):

"According to the last will of 19 May 1931, the decedent, Thomas Bata, has property in the amount

of Kc. 57,262,131.—consisting of a claim upon Jan A. Bata. Because Jan A. Bata has settled this amount with the firm Bata a. s. in Zlin to the benefit of the test(ator), Thomas Bata, this property of Thomas Bata appears, as of the date of his death, as a claim against the firm Bata a. s. in Zlin."

Receipts from each of the beneficiaries of this sum were obtained and filed in the Probate Court.

Thus it is conclusive that the Czechoslovakian Court of competent jurisdiction determined the two documents in Thomas' handwriting both to be valid, and implemented them both, and probated, administered, and disposed of the estate of Thomas Bata in accordance with both documents.

All of the heirs and relatives of Thomas Bata, and all of the Bata business officials who included many relatives of the widow Marie T. Bata and of the son Thomas J. Bata, accepted the implementation of the two documents and joined in the fulfillment of the probate administration and disposition of the estate.

Czechoslovakian Determination Never Reversed

The Czechoslovak Probate Court has never reversed or modified any of the proceedings which it conducted in administration and disposition of that estate. Those proceedings have never been challenged in that Czechoslovak Probate Court or in any Czech Court having appellate or other jurisdiction in Czechoslovakia. The proceedings with respect to the administration of the estate in the Czechoslovak Probate Court were all with the approval of Marie Bata and Thomas Bata, Jr., who were parties to the proceedings and who received the legacies specified by the deceased Thomas Bata.

The Collateral Attacks

The reasons for the rule against collateral attacks upon *in rem* proceedings are well illustrated by the con-

fusion and uncertainties wrought in this case by the erroneous entertainment by some other courts, of collateral attacks upon the Czechoslovak probate proceedings. Such attacks, if legally possible, would create situations where effective administration of justice would be impossible. Other legatees and claimants would be involved. A redistribution of the entire estate would be necessary, but that could not be done by the foreign courts. Questions would arise as to what would happen to prior wills, if courts other than the original probate court were permitted to declare invalid a testamentary instrument which a probate court had held to be valid, and under whose provisions the probate court had actually distributed the estate.

We are not concerned with any question whether these documents were valid testamentary instruments under our law. The only questions which our courts may consider are whether the Czech Probate Court had jurisdiction and whether is exercised the jurisdiction. *As to the validity and effect of those two documents under Czech laws, the Czech Probate Court, to use the words of Justice Holmes in* Hapai *v.* Brown, supra, *was "the final mouthpiece".*

The Bata Situation in 1931

It is noted that this Delaware court and the New York court have been inclined to view these two documents of the deceased Thomas Bata as very strange and unusual and has thereupon reached for interpretations which would set them aside as fictitious or otherwise invalid.

In addition to the fact that the interpretation and implementation of these documents were within the exclusive jurisdiction of the Czechoslovakian courts and that their exercise that jurisdiction is not subject to collateral attack, may we bring certain incontrovertible and historical facts into focus which contribute toward understanding the events and decisions and demonstrate that there was nothing strange.

Thomas Bata had become sole owner of the Bata enterprises when he was given one-half interest of his brother Antonin Bata upon the latter's death. The enterprises had continued to be known as T and A Bata, the T standing for Thomas and the A standing for his brother Antonin.

In 1930 the worldwide depression was marked by the erection of tariff walls against imports by nearly all major countries. Likewise in 1930 Hitler and his Nazi party began their rapid rise toward power, winning 107 seats in the German Reichstag in September 1930, and voicing vitriolic attacks on their neighbor countries in central Europe, practicing extreme anti-semitism and making war-like declarations. At the same time Communist organizations were active in riots and violence throughout central Europe.

The Bata enterprises had been developed on the basis of large mass production in Czechoslovakia and huge exports to other countries. The sharp change in world trade and the conditions of depression cut off these export markets and required a major change in the Bata enterprises if they were to survive and be successful.

At the same time the spectre of war loomed with a dual threat to Czechoslovakia in its geographic position from the Hitler Nazis of Germany and the Stalin Communists of Russia.

Under these conditions it was clear that the Bata enterprises could survive and succeed only if they had a strong decisive captain or chief with the power to make final prompt decisions which could best flow from complete ownership.

Furthermore the working capital and reserves of the Bata enterprises needed to be kept in a manner which would make them least susceptible to expropriation or capture or devaluation, and best available for use in establishing new decentralized manufacturing units over a wide geographical area of the world.

These were the conditions under which Thomas Bata turned to Switzerland in February 1931 for the formation of the holding company, Leader A. G., and turned to his brother Jan A. Bata in the documents of May 1931 as the single chief and complete owner to take control in the perilous and unusual conditions, providing at the same time for cash for his wife and for his sixteen year old son more than adequate for their personal needs, but not so large as to denude the essential working capital and reserves for the survival of the Bata enterprises.

The wisdom and soundness, rather than unusualness or strangeness, of Thomas Bata's decisions as reflected in the two documents of May 1931 is even more apparent when we note that practically all of the factories and resources of the Bata enterprises as of May 1931 and as of the date of his death June 12, 1932, have been wiped out by war, expropriation, and confiscation.

The vast and substantial Bata enterprises of today are almost entirely traceable to the change of the foreign import and sale companies over to manufacturing units, the establishment of many new foreign units, the building of large quantities of machinery in Czechoslovakia and shipping it around the world as capital contributions between 1932 and 1942, the skilled personnel sent from Czechoslovakia to manage these units and to train local employees, the reserves used to capitalize and expand these units and carry them through their initial and depression years, and the Bata technical experience and knowledge provided to them.

Thus the Bata enterprises and resources of today should be credited in the main to the decision of Thomas Bata reflected in the two May 1931 documents, and to the courageous and skillful implementation of that decision as carried forward by Jan A. Bata.

Westhold and North River.

Neither Westhold Corporation nor North River Securities Corporation was in existence at the death of

Thomas Bata. Thus Thomas did not own their shares. These shares were not a part of his estate.

Both Westhold Corporation and North River Securities Corporation were organized by Edward N. Goodwin and the law firm of Campbell, Harding, Goodwin & Danforth who were acting as the attorneys for Jan Bata, as Mr. Goodwin has confirmed.

> "This firm has been New York Counsel for Jan A. Bata and the Bata interests for a number of years," August 21, 1940. (Defendant's Exhibit 817, item 7.)

In fact, Mr. Goodwin specifically stated in Defendants Exhibit 817, item 1,

> "Westhold Corporation is a holding company organized April 5, 1940, under the laws of Delaware, with authorized capital of 10,000 shares of the par value of $100 each, of which 1,000 shares are now outstanding. There are only two stockholders, who are acting for Bata interests. The British authorities allege that Westhold Corporation is controlled by Jan A. Bata, and this is not disputed."

Mr. Goodwin continued to act as attorney for Jan Bata until June 2, 1942. (Defendant Exhibit 1185).

Neither plaintiff Thomas J. Bata nor deceased Mary T. Bata at any time controlled Westhold Corporation or North River Securities Corporation, nor did they at any time have possession or ownership of any of the shares of these two corporations.

Thus it is submitted that this Court erred with regard to the shares of Westhold Corporation and North River Securities Corporation.

The 800 shares of Leader and the 280 shares of Leader were transferred to Westhold, and by Westhold to North River in 1940 in conjunction with the attempted liquidation of the Bata Dutch holding corporation known as Bave, prior to the Nazi invasion of Holland. The

holding of these shares by Westhold and North River at a time when Jan controlled these corporations, is a further confirmation of his ownership.

Furthermore, the all embracing language of the May 10, 1931 document was clearly intended to include all of the Leader shares, and it was so interpreted by all concerned in the implementation of the probate proceeding, administration, and disposition.

Jan Bata's Ownership Confirmed

All of the facts reviewed above, and hereafter analyzed in Section IV hereof, and in the record as a whole, fit together to confirm and reconfirm a definite position of control, possession, ownership, and title of Jan Bata in the Bata enterprises and in all of Thomas Bata's property, and further confirms and fulfills the evident intent of the deceased Thomas Bata as carried forward by the Czechoslovakian Probate Proceedings, Administration and Disposition.

Objection to Jurisdiction May Be Raised at Any Time

It is of course, elementary that the objection to jurisdiction over the subject matter can be raised at any stage of the proceedings and even after judgment. *Matson Navigation Co.* v. *United States* 284 U. S. 352 (1931); *American Fire and Casualty Co.* v. *Finn* 341 U. S. 6 (1951); *Frankel* v. *Satterfield*, 14 Del. (9 Houst.) 201, 19 A. 898 (1890); *Hollingsworth Co.* v. *Cesarini*, 50 Del. (11 Terr.) 307, 129 A. 2nd 769 (1957).

Rule Against Collateral Attack Requires Reversal

Respect for the *in rem* Czechoslovakian Probate Proceedings, Administration and Disposition of the estate of Thomas Bata requires a reversal of the decision of this Delaware Court and the awarding of the possession of the shares of Leader and of the Westhold Corporation, and of the North River Securities Corporation to the defendant appellant Jan A. Bata.

II. JAN BATA'S RIGHTS UNDER TREATIES WITH BRAZIL.

Defendant appellant Jan Bata as a citizen of Brazil is entitled to the protection of the Status of Aliens Treaty of which both Brazil and the United States are signatories; and of the Treaty of Friendship between Brazil and the United States proclaimed March 18, 1829; and of the Rights of Aliens accorded by the Government of the United States. These treaties are the Supreme Law of the United States in accordance with Article VI of the Constitution of the United States. These rights include the right to respect for the *in rem* Czechoslovakian Probate Proceedings, Administration and Disposition. These rights include a right to an independent final determination by the Federal Courts of the United States, and foreclose any *res judicata* effect of the New York Decision. These rights include a right to proper recognition for the Dutch Decision entered by the Supreme Court of the Netherlands. The failure to fulfill and respect these treaty and international rights and the taking of his property in violation of these rights, would constitute a violation of the 14th Amendment of the Constitution of the United States. The opinion of this Court would result in a violation of the treaty rights of Jan A. Bata and a violation of the 14th Amendment of the Constitution and should be reversed.

Status of Aliens Treaty.

The Status of Aliens Treaty (Treaty Series, No. 815), between inter alia The United States and Brazil, proclaimed June 6, 1930, provides:

> "ARTICLE 5. States should extend to foreigners, domiciled or in transit through their territory, all individual guaranties extended to their own nationals, and the enjoyment of essential civil rights without detriment, as regards foreigners, to legal provisions governing the scope of and usages for the exercise of said rights and guaranties.

"ARTICLE 8. The present convention does not affect obligations previously undertaken by the contracting parties through international agreements." (*46 Stat. 2753*)

Treaty Between Brazil and the United States.

The treaty between the United States and Brazil proclaimed March 18, 1829 was a Treaty of Friendship, Commerce, and Navigation. (Treaty series No. 34). Article 12 of that treaty provides, as follows:

> "Art. 12th. Both the contracting parties promise and engage formally to give their special protection to the persons and property of the citizens and subjects of each other, of all occupations who may be in their territories, subject to the jurisdiction of the one or the other, transient or dwelling therein, leaving open and free to them the tribunals of justice for their judicial intercourse, on the same terms which are usual and customary, with the natives or citizens and subjects of the country in which they may be; for which they may employ, in defense of their rights, such advocates, solicitors, notaries, agents, factors, as they may judge proper in all their trials at law."
> (*8 Stat. 390, at 392*)

While the Commerce and Navigation portions of the treaty were renounced by Brazil under the terms of the treaty, Article 12 above is not a part of the Commerce and Navigation clauses and is in effect.

The United States has recognized these rights of aliens as basic with friendly countries. The United States does recognize Brazil as a friendly state and has done so throughout the entire period of time with which we are here concerned.

The instant case is definitely one in which these Federal safeguards and Federal rights should apply.

It is essentially an action brought by a Canadian citizen and the Canadian and British representatives of a deceased citizen of Bermuda, against a citizen of Brazil for shares of a Swiss Corporation organized by a deceased citizen of Czechoslovakia at a time when all parties were citizens of Czechoslovakia. The decision in this case affects the external affairs of the United States.

The Jurisdiction of the Federal Courts

The holdings of the Supreme Court of the United States are clear that the United States has exclusive and plenary power over external affairs and everything affecting external affairs, as an attribute of its sovereignty and not dependent on affirmative grants in the Constitution.

U. S. v. *Curtiss Wright Export Corp.*, 229 U. S. 304 (1936);
U. S. v. *Belmont*, 301 U. S. 324, 331, 332 (1937).

As stated in the Belmont case, at pages 331-2:

> "In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision."

In a leading article in the Columbia Law Review it has been suggested on the basis of the foregoing power,

> ". . . that 'state lines disappear' in situations involving the judgments of foreign nations as well" and that "since the effect of such judgments in this

country clearly affects our relations with other nations, the question would seem properly to fall within the federal sphere."

The Status in this Country of Judgments Rendered Abroad, Reese, 50 Columbia L. R. 783, 788.

In any event, the above reasoning supports the clear rule, that the Federal Courts have jurisdiction in any case having as a party a person whose substantive or procedural rights are protected by a treaty.

United States v. *Pink*, 315 U. S. 203, 217 (1942).

The jurisdiction referred to is jurisdiction for the Federal Court to make a final determination on its independent judgment on the record.

United States v. *Pink, supra.*

Ricaud v. *Am. Metal Co.*, 246 U. S. 304, 309 (1918).

In particular, Jan Bata is entitled to rights under the treaties of the United States with Brazil and to the protection of the Federal Courts with respect to those rights.

This Delaware Court is bound by these treaties, and it is submitted that this Court has not given Jan the "special protection" to his property affirmatively agreed to in the treaties.

III. The Dutch Supreme Court Decision, the Dutch Bata Shares, and 890 Shares of Leader A. G.

Alternatively, the Dutch Supreme Court Decision, in view of incontrovertible facts in the record of the instant case which through error were not noted by the Delaware Supreme Court, is conclusive to the effect that the possession of the 890 shares of Leader A. G. should be restored to Jan A. Bata and his ownership of these shares should be confirmed.

The Dutch case was brought by the same plaintiffs as in the instant Delaware case, against the same defendant with the same issues and directly involved the ownership of bearer shares in the Dutch Corporation known as Bata Best.

The Dutch Trial Court, Court of Appeals, and Supreme Court at The Hague all decided in favor of Jan Bata and awarded him the ownership of all of the shares there in issue.

The decision was not narrow. It covered the basic issues.

The Dutch Court found that the ownership of Bata a.s., the home Bata Corporation at Zlin, had been delivered or transferred to Jan Bata and that he had set up on the books of that corporation a debit against his account in the amount required and a credit for Tom, Marie and the other beneficiaries under Thomas' will in the amounts of their legacies, which totaled the amount due under the May 10th document.

The Dutch Court of Appeals held in paragraph 67:

> "... Tomas Bata disposed in a legally valid manner of the ownership of the shares of the companies belonging to his concern in favour of Jan Bata."

The Dutch Supreme Court confirmed the decision of the Court of Appeals.

In the light of this Dutch Decision, clearly Jan Bata, upon the death of Thomas Bata, as an absolute minimum acquired the ownership of all of the *Dutch shares* which were enumerated by Thomas Bata in his May 10, 1931 document.

Two items of Dutch shares were enumerated.

"Bata Matschapai	Amsterdam	51,000 Hol. fl.
Bave Matschapai	"	20,000 Hol. fl."

The first of these is known as Bata Best.

The Bata Best shares were the majority shares of this corporation. They represent 51% or 51,000 Hol. fl. out of a total nominal capital of 100,000 Hol. fl.

Thus Jan Bata became the clear and definite owner of the majority of shares of Bata Best. This significant

fact has been mistaken by error by the Delaware Supreme Court in its opinion. It is a key fact because the 890 shares of Leader A. G. now in issue in this Delaware Action were the property of Bata Best on May 10 and May 19, 1931 when Thomas Bata wrote the two documents, and upon his death on July 12, 1932. The receipt for the shares had been signed by Thomas Bata on behalf of Bata Best, as this court found. The capital subscription for these 890 shares of Leader had come from Bata Best (Defendant's Exhibit 1326, page 3). The minority 49% shares of Bata Best at Thomas Bata's death were reciprocally held by Leader. Thus these 890 shares of Leader A. G. came into the undeniable control, possession, and ownership of Jan Bata.

They continued to be held by Bata Best and by the companion Dutch holding company Bave until they were sent to Westhold to keep them away from the Nazi occupation of Holland during the war. No consideration was paid for the transfer, which was purely a war time maneuver.

Jan Bata became the Chairman of Bata Best, succeeding Thomas Bata. He had the undisputed right and power on his own individual signature to commit or transfer or withdraw any assets of Bata Best or to take any action in the name of Bata Best.

This situation continued for a number of years and definitely more than three years.

During all of this time Bata Best continued to hold the 890 bearer shares of Leader A. G.

Nothing in the later actions taken by Jan Bata in view of the dangers of war, to reorganize Bata Best and place the majority of its shares reciprocally in Leader A. G., to elect a new Chairman, Dr. Miesel, and then to move the 890 Leader shares to Westhold and North River; has alienated the ownership and right to possession of these 890 shares of Leader A. G. by Jan Bata.

Thus, alternatively and as an absolute minimum effect of the Dutch Decision, Jan Bata is entitled to be the minority owner of 890 shares of the 2000 shares of Leader A. G.

It is respectfully submitted in the alternative that the opinion of this court should be reversed in this respect, and the possession of the minority of 890 shares of Leader A. G. be awarded to Jan Bata and his ownership thereof be confirmed.

In making this detailed special analysis with respect to the 890 shares of Leader and the Dutch shares, defendant-appellant does not withdraw his position that the Czechoslovakian probate proceedings and probate disposition in and of itself established the ownership of Jan Bata to all shares of all the Bata companies and is not subject to collateral attack.

Furthermore the Dutch Supreme Court Decision, viewed in its entirety, constitutes inherent support for the entire Czechoslovakian Probate proceedings, Administration and Disposition, and is in itself a basis for a decision by the Delaware Supreme Court that all of the shares in custody in Delaware be awarded to Jan Bata.

IV. The 1942 Agreement and Representations

Alternatively, the transactions, documents and arrangements related to the July 1942 mission of the plaintiffs' lawyer, W. W. Parry, to Jan Bata in Brazil constitute undisputed evidence of an agreement and recognition by the plaintiffs of the ownership of the Leader shares and the entire Bata enterprises by Jan Bata. They constitute an agreement or representation to return custody, possession and control to Jan Bata six months after the duration of World War II. They include a representation by plaintiffs to Jan Bata upon which he relied and thus operate as an estoppel of the plaintiffs. It is respectfully submitted that they, in and of themselves, are a

basis for a reargument and for a reversal of the opinion of this Court.

W. W. Parry was the Canadian lawyer of the plaintiffs for a number of years and was acting in this capacity when he went to confer with Jan Bata in Brazil in 1942. He made the trip at the request of the plaintiffs and his mission was planned thoroughly by the plaintiffs in consultation with Edward Goodwin and Ralph Ketcham. The results of his mission were accepted and confirmed by the plaintiffs.

Let us then note the series of documents and arrangements which resulted from this mission.

Jan Bata agreed with the proposal of the plaintiffs presented by Parry as expressed in the following letter to Westhold;

(Defendant's Exhibit 1198)

"Jan A. Bata Rio de Janeiro, June 18, 1942.
To
Westhold Corporation
New York City, USA.

Re: Bata Shoe Company Inc. Belcamp, Hidena Inc. Belcamp, Ataman Inc. Belcamp, Anchor Mercantile Co. Inc. New York, Chaussures Bata Haiti S. A. Port au Prince, Fabrica de Calzado Peruana S. A. Lima, Manufactura Boliviana S. A. Cochabamba, Bolivia, Catecu Ltda. Penaflor, Chile, Aricoba S. A. Buenos Aires, Argentina, Incatecu S. A. Guatemala City.

Dear Sirs:

Following a lengthy conference with Mr. W. W. Parry K. C. of Toronto, and with every desire to have and for the specific purpose of having the above Companies removed from black list as to enable them to trade freely I hereby instruct you as follows:

1. **I agree to the creation of a Committee** or Board composed of representatives of the Czechoslovak, British, American and Bata interests **which shall for the duration of the war control, operate and direct these Companies.** For this purpose I have given the attached authority and will myself immediately deliver my shares, properly endorsed to Westhold Corporation, to whatever authority or person you may advise, you in turn to create any necessary trust for the above purposes.

2. I undertake upon the formation of the Committee referred to in paragraph 1 that I will neither directly or indirectly interfere in any way with the operation of these Companies nor use my influence in any way so as to effect the conduct of any of the officers or employees thereof. **I attach instructions to them.**

3. It shall be the duty of this Committee to control and administer the Companies in their best interest and with a view to their successful operation.

4. **I specifically direct that the Committee shall pay over all the profits of these Companies** / after deductions of all proper expenses including normal amortisation charges for buildings and equipment / **to a duly accredited representative of the Czechoslovak Government in exile to be used in its discretion in furthurance of our National Cause and war efforts.**

5. **I agree, that the control so created, shall continue during the war and for the period of six months after** the signing of Declaration of Peace, when if the majority of the Committee agrees, **the shares will be returned to Westhold Corporation for distribution as I may direct.** I understand specifically and agree that the return of the shares will be conditional upon such majority determining that I have not, by

my actions confessed and proved myself in alliance with the Axis Powers. Should however the majority not so determine, I agree that said shares be then delivered to the Government of Czechoslovakia to be disposed of as directed by the legal National Assembly in Prag, except in the case that the majority of this Assembly is at that time communistic or collectivistic in which event I agree that the question of the disposition of said shares be left in the hands of the Government of the United States of America.

6. As evidence of my good faith, I agree to have no communication during the war with Bata Organizations in occupied or Axis territory without approval. For the purpose of obtaining prompt consideration of applicating for such approval it will be necessary for the Committee to appoint some authority in Sao Paulo. **I am also content to submit all correspondence, cables and other communications to and from Switzerland to the same authority.**

7. I agree to be at the disposal of the said Committee for technical advice in connection with problems arising from time to time. I may consult the Committee with reference to my own business problems.

8. You will agree do nothing in my behalf, which will have the effect preventing me or others on my behalf, from applying in the proper way for my ultimate removal from the black list.

9. As I understand the plan contemplated herein has not been officially sanctioned. I authorize you to consent to any ammendment, variation or extension, that may appear necessary to you, to effect the purpose generally of this letter, which is to remove the Companies from the black list. I do not want you to be prevented by anything in this letter from agreeing

to any proposal, that you may determine to be in the best interest of the operation of the said Companies during the war.

Very truly yours,
(S) Jan A. Bata

Witness:
(S) F. Schmid" (Emphasis ours)

It is now clear and definite that the contingent conditions in paragraph 5 of the foregoing did not occur. Jan Bata was never in allianee with the Axis powers, and, in fact, assisted the Allied powers. The legal National Assembly in Prague in Czechoslovakia did come, under Communistic and collectivistic control and has no jurisdiction under the terms of paragraph 5.

Therefore, there is a clear right in Jan Bata to the return of the shares which include the Leader shares herein involved, and all of the shares of Westhold and of North River.

At the same time and upon these representations and agreements, Jan executed the following document. (Defendants Exhibit 1196)

"JAN A. BATA Rio de Janeiro, June 18, 1942.

To all persons holding on my behalf shares of stock, voting certificates or trust certificates of Bata Shoe Co. Inc. Belcamp, Hidena Inc. Belcamp, Ataman Inc. Belcamp, Anchor Mercantile Co. Inc. New York, Chaussures Bata Haiti S. A. Port au Prince, Fabrica de Calzado Peruano S. A. Lima, Manufactura Boliviana S. A. Cochabamba, Bolivia, Catecu Ltda. Penaflor, Chile, Aricoba S. A. Buenos Aires, Argentina, Incatecu S. A. Guatemala City.

I hereby direct and authorize you, for me and my behalf to transfer, set over and assign to Westhold Corporation of New York, absolutely, for such purposes as the Corporation may determine, all shares, right to shares, voting and all other share rights in connection with the above noted companies.

I hereby agree to execute such further and other documents as may be necessary to vest in the said Corporation all the shares of the above Companies held by you as aforesaid.

Very truly yours
(S) Jan A. Bata"

The plaintiffs proceeded at once to use this power and authority and did not wait for any concurrence or agreement by the United States Government. Thus so far as the plaintiffs were concerned, an agreement with Jan Bata arose, or representations of the plaintiffs became effective. Under These facts, by agreement, or alternatively by estoppel, Jan Bata became entitled to the return of his property six months after the ending of the war.

Jan wrote to the managers of the Bata enterprises as reflected by one of the letters set forth as follows:

(Defendant's Exhibit 1200)

"File No. 12 Jan A. Bata

Argentina

Batatuba, 1 July 1942.

Mr. Bartolome Cekota
25 de Mayo 375
Buenos Aires
Dear Mr. Cekota:

About a week ago I have finished the dealings in regard to wiping out our enterprises on this hemisphere from the blacklist. There has arrived in Brazil the director of law of Thomas' corporation, who was allowed by the American and British authorities to present me the conditions on which it would be possible to have the enterprises on this hemisphere wiped off of the black list and to make it possible for them to trade freely for the duration of the war.

I have agreed with it and signed, that during the war and for six months after the peace treaty I will deliver the management of the enterprises in South and North America into the hands of a committee which should be established in the United States of America of which members should be installed partly by the USA government, partly by Czechoslovak government and a further part of this committee will be composed of our leading people in USA and Canada which will be most likely Messrs. Frank Muska, Thomas Bata, John Hoza, Fryda Meisel, W. W. Parry and E. N. Goodwin. The director of this committee should be Mr. Muska or some other one of the gentlemen named, in case that the health of Mr. Muska would not allow him to carry on this work, because I am advised that he is very seriously ill. Probably it would be then Mr. Meisel.

Shares and interests of the enterprises on this hemisphere which are my property, whether they are in my hands or in the hands of my trustees, will be handed over to this committee or deposited according to its dispositions, which will manage the enterprises during the war and **will have during the war and until six months after the peace treaty all the rights of the proprietors.**

In our agreement I have also confirmed that, in case that the plan will be realized, all profits of our enterprises on this hemisphere, after deductions for taxes, general expenses and depreciation of buildings and equipment should go to the benefit of the Czechoslovak cause and I am asking you to cooperate with them in this matter, as far as the local laws will permit you to do so.

I have decided to remove myself from the management of the enterprises so as to make it possible for them to be eliminated from the blacklist and to put the management into the hands of the above

named committee in full trust, that you will manage and build up the enterprise according to the directions, which I have given you by my visit to you last year and which were given by the fixed estimates. If this agreement comes into effect I shall let you know by an additional personal letter. Until the time that you receive this letter everything will naturally stay as it has been up to now.

I expect the confirmation of the receipt of this letter from you, and remain yours

signed Jan A. Bata"
(Emphasis ours)

Thomas Accepted and Confirmed Parry's Agreement

Plaintiff Thomas Bata accepted and confirmed the results of Parry's Mission and on this basis took control of the Bata enterprises as reflected in letters to the managers of which the following is an example:

(Defendant's Exhibit 1214A)

"Translation: D 1214-A

Thomas J. Bata
Frankford, Ont. August 27th, 1942.

Dear Mr. Cekota:

According to negotiations between the american lawyers and american, british and czechoslovak authorities in respect of the black list, Major W. W. Parry K. C. made recently a voyage by plane to Brazil. The objective of that voyage was that Major Parry submitted to Dr. Jan A. Bata conditions of the american government **as to a new proprietary and administrative arrangement** necessary to achieve removal from the black list. Dr. Jan A. Bata has accepted those conditions.

On the basis of the mentioned negotiation **I have been entrusted with the organization of a new administrative center** for the majority of our companies on the western hemisphere. The board of directors will be nominated partly by us, partly by american and partly by czechoslovak authorities.

Within few days you will receive from our lawyers: Campbell, Harding, Goodwin and Danforth, New York explications of conditions and **orders to be fullfilled**. It is unconditionally necessary that you carry out these and any other orders precisely and without delay in your own and your companys interests.

We are decided to submit all firms under the administration of the new center (of coordination) falling fully under the war efforts of the United Nations and we are expecting your suggestions as to how your company can contribute best on this field. As far as the control work of the center is concerned its scope will depend from the exact fullfillment of the orders.

The reason for some of our companies having been put on the black list has been, first of all, the connections, which those companies and its employees have tried to maintain by most varied ways with firms and companies in territories occupied by the enemy, and firms included in the black lists. I expect, that in the future and with due regard to the difficult two years negotiations needed in order to achieve the delistment you will arrange that it will be made completely impossible to repeat the above mentioned defects.

The delistment will enable you to continue—after two years delay—with the development of your company so as it corresponds to the plans with which you **have** started it some years ago and that the effectuation of this plan will contribute to the War

effort of the United Nations and to the after-war economic reconstruction of Czechoslovakia.

With regards and the best wishes for success.

(s) T. J. Bata

Bartolome Cekota, Esq.
Aricoba S. A. de Comercio e Industria S. A.
25 de Mayo 347
Buenos Aires, Argentiña" (Emphasis ours)

This is also confirmed in plaintiff Thomas Bata's letter to Mr. Ketcham.

(Defendant's Exhibit 1214)

" August 27th, 1942

Dear Mr. Ketcham:—

This will confirm this morning's telephone conversation, where the following points transpired.

1. I shall try to obtain permission in Ottawa to send a letter to the various companies that are to be controlled by ABAL, addressed to their managers, and explaining in Czech what it is all about and what we will want them to do. I expect my letter to be of less than one page, and will state roughly that detailed information and instructions will be received from your office within the next few days.

2. In the paragraph where ABAL is instructing them to prepare to transfer the stock, I think the second sentence should read "others will instruct you when to carry through these arrangements."

3. Where we are instructing them to forward financial statement, we should expand that paragraph to include details to the financial statement, and also half-yearly and five-yearly estimates.

4. Will you please check with Lizalova, what the name of the manager in Bolivia is.

Yours very truly,

BATA SHOE COMPANY OF CANADA LIMITED
By:

(Signed) Thomas Bata
President

TJB:C

Mr. Ralph Ketcham
Campbell, Harding, Goodwin & Danforth
44 Wall Street
New York City."

It is respectfully requested that this Court note that these documents are unmistakable in their terms and Jan Bata was recognized and agreed to have the proprietary ownership of all Bata companies in North and South America and the power and authority to dispose of the entire income of the Bata enterprises. Plaintiffs asked him to exercise this power and he did so. This is the power and authority of ownership. In so doing, he was confirmed in this power and authority over corporations which held the majority of Leader shares, including the shares in custody in this instant action. He was confirmed in this power and authority over corporations of which Leader in turn held the majority stock, and thus inescapably Jan's power and authority over Leader shares was doubly confirmed and agreed.

Plaintiffs further agreed and committed themselves that six months after the duration of the war, this custody and control would be returned to Jan Bata, barring certain contingencies which did not occur.

It is undeniable that Jan Bata relied upon these representations and placed the custody and control of the Bata enterprises in a group of which the plaintiff Thomas Bata became chairman.

Plaintiffs wrongfully took advantage of this custody and control and breached the trust which Jan Bata had placed in them.

The agreement to return the custody and control to Jan Bata should be fulfilled, and the shares in custody in this action should be delivered to Jan Bata. The plaintiffs are estopped to claim otherwise.

V. Other Grounds

Alternatively, it is respectfully submitted, on each of the other positions heretofore presented to this court, the evidence will not support the decision of the court, and on the merits the defendant appellant is entitled to a decision in his favor.

1. The Dutch Decision included a finding of sales legacy as an overriding issue, and is in this and other respects controlling.

The Dutch Court of Appeals stated at paragraph 61:

> "The Court of Appeal is of opinion, that this codicil contained a purchase legacy in favor of Jan Bata, like the District Court rightly considered, if an oral purchase agreement should not be assumed."

There could not be acquisitive prescription without this finding, and acquisitive prescription was limited to a fulfillment of delivery of possession which the court held could have in any event been required as an obligation of the heirs.

2. The May 10th and May 19th documents together, on the merits, qualify either as a valid contract plus a testamentary disposition, or as a combined testamentary disposition. More than one document may be the testamentary declaration in Czechoslovakia in 1931 and 1932. It is obvious on its face that the May 19th document was not intended to revoke the May 10th document, but rather to confirm and incorporate it.

3. A constitutive recognition is established by the evidence, including especially the evidence of the 1942 arrangements in relation to W. W. Parry's mission to Jan Bata in Brazil.

4. A tacit waiver is proven by the many years of acceptance of Jan as chief and owner, and by the 1942 transactions with W. W. Parry, and by the possession of the shares of Leader in the Dutch Bata Corporations when these corporations were without dispute in the ownership and control of Jan Bata.

Alternatively, in each of these the Defendant Appellant's treaty rights have been violated, and he has been denied due process and equal protection of the law, in violation of the 14th Amendment of the Constitution of the United States. See *Konigsberg* v. *State Bar*, 353 U. S. 252 (1957).

VI. Compensation to Jan Bata

Alternatively, if this Court does not reverse its opinion in the foregoing it is respectfully submitted that this Court should in equity modify and extend its decision with regard to compensation to Jan Bata for his services, should establish a lien on the shares in custody for the benefit of the defendant Jan Bata, should direct the Chancellor to determine the amount to be awarded for compensation for services to the property in custody and to make this determination without requiring the deposit of minority shares and without requiring any other condition precedent.

In his opinion, the Chancellor noted that the benefit conferred by the services performed by Jan was reflected in the enhanced value of the property and that Jan for many years conducted the affairs of the Bata enterprises with skill and good judgment and certainly with the tacit consent of the plaintiffs. The Chancellor stated: "I am convinced that principles of equity require that he be compensated for the valuable services rendered to the

enterprise", as trustee, as a condition to delivery of the property to the plaintiffs, but conditioned the granting leave to file the claim upon Jan's depositing with the Court his "minority shares." *Bata* v. *Hill*, 143 A 2d 728, 731-5 (1958).

When, as stated by this Court, "Jan was unwilling voluntarily" to do this, the Chancellor dismissed his claim. This Court stated that Jan asked "compensation for the services in respect of the property in suit as a condition to delivery of the property to plaintiff". This Court, after discussion, affirmed the dismissal of the claim but held that the dismissal should have been without prejudice, as premature, since the rights to minority stock had not been determined, and since Jan had not submitted the minority shares to the jurisdiction of the Delaware Court to determine its ownership.

Jan's Rights to Compensation

It is our position that in any event, Jan is entitled at least to present his claim to the Delaware Court for compensation for services rendered to the property now in the jurisdiction of the Court.

The reason for this is that Jan is responsible for the great enhancement in value of the property in suit. His services leading to such enhancement were rendered under the supposition that he was owner.

In *Williams* v. *Gibbes*, 61 U. S. (How.) 535 (1857), James Williams was owner of the share in the Baltimore Company. He became insolvent in 1819 and in 1825 his insolvent trustee sold the share to Oliver for $2,000.00. Thereafter until 1849, Oliver in his lifetime and his executors Gibbes et al thereafter, on the assumption that they had good title to said share, with substantial expenditures of time and money, prosecuted claims of the Company against the Mexican Government. Success resulted from Oliver's effort and in 1839 some $41,000.00 was awarded on the share of Baltimore Company trans-

ferred to him. Subsequent to Oliver's death his executors continued to press the claim and safeguard the property. In 1949 the Maryland Court decided that no title had passed to Oliver by said assignment and that title remained in Williams and hence, in his administrator. Williams' administrator sued Oliver's executors for the fund recovered from the Mexican Government on said share. In defense Oliver's executors set up as charges against the fund costs and expenses incurred by them and the value of services rendered by Oliver. All of these items, including 35% for services, were allowed by both the Circuit Court of Appeals and the Supreme Court of the United States on the principle that he who seeks equity must do equity. That Court stated, at page 537-8:

> "• • • the question is, whether, upon any established principles of law or equity, the court below were right in taking into the account in the settlement between the parties these services and expenses. We are of opinion they were.
>
> "By the judgment of the Court of Appeals of Maryland, Oliver was at no time the true owner of this share, as, notwithstanding the assignment by the insolvent trustee, it still remained in Williams. Oliver thereby became trustee, instead of owner, of the share and of the proceeds, as did also his executors, and they must be regarded as holding this relation to the fund from their first connection with it. • • •
>
> "The services rendered and expenses borne could not have been dispensed with, consistent with their duties as trustees.
>
> "But it is said that these suits were defended by the executors, while claiming the fund in right of their testator, and hence for the supposed benefit of his estate; that the defence was not made in their character of trustees, and cannot, therefore, be regarded

as a ground for charging the estate of Williams with the costs of the litigation.

"The answer to this view is, that although in point of fact the defence was made under the supposition that the fund belonged to the estate of Oliver, yet, in judgment of law, it was made by them as trustees, and not owners, as subsequently judicially ascertained; and as the costs and expenses were properly incurred in the protection and preservation of the fund, it is but just and equitable they should be made a charge upon it.

"The misapprehension as to the right cannot change the beneficial character of the expense, when indispensable to its security.

"The duty of a trustee, whether of real or personal estate, to defend the title, at law or in equity, in case a suit is brought against it, is unquestioned, and the expenses are property chargeable in his accounts against the estate. (2 Story Eq. Juris., sec. 1275.) * * *

"In respect to the thirty-five per cent. allowed for the prosecution of the claim against the Government of Mexico, it stands, in principle, upon the same footing as other services and expenses incurred in protecting and preserving the fund after possession was obtained. The amount of compensation depends upon the proofs in the case as to the value of the service, and which must, in a good degree, be governed by the usual and customary charges allowed for similar services and expenses."

The present situation is analogous to that in which a person, mistakably believing himself to be the owner of the land, makes permanent improvement in the land. It then later turns out that he was mistaken and the land is owned by another. Nevertheless, it has been repeatedly held that under such circumstances, if the

owner seeks to take over and oust the improver, the latter is entitled to receive the full value of his improvements, particularly when the owner has acquiesced in the making of the improvements and has a lien on the property for that purpose. *Bright* v. *Boyd*, 1 Story 478, Fed. Case No. 1875 (1841), opinion on entry of final decree, 2 Story 605, Fed. Case No. 1876 ((1843); *Schleicher* v. *Schleicher*, 120 Conn. 528, 182 A 162 (1935); *Union Hall Assoc.* v. *Morrison*, 39 Md. 281 (1873); *Magnolia Construction Co.* v. *McQuillan*, 94 N. J. Eq. 736, 121 A 734 (1923); *Frazier* v. *Frazier*, 264 SW 2d 665 (Kentucky, 1954); and see also the cases cited at 57 A. L. R. 2d 263 et seq., *Improvement—Other's Premises—Mistake*.

Jan's Services to Property in Suit

It is estimated, and evidence will be presented if the Chancellor hears this matter of compensation, that the Leader, Westhold and North River shares in custody have a value of approximately one hundred eighty million dollars. This value is arrived at on the basis that an estimated value of the entire Bata enterprises and resources is four hundred and seventy million dollars, Leader combined with Westhold and North River holds between fifty-five and sixty percent of the total, or approximately two hundred seventy million dollars in value. The shares in custody represent approximately two-thirds of this total, or approximately one hundred eighty million dollar value.

Of this one hundred eighty million dollar value, at least one hundred twenty million dollars of value is directly and indirectly attributable to the leadership and services of Jan A. Bata in establishing new enterprises located away from the areas of war and out of reach of postwar Communist takeovers, in supplying these new enterprises with large quantities of machinery, skilled employees, necessary capital, and in establishing excellent policies and programs for development.

This leadership and these services have occupied the major portion of the most productive years of the life of Jan Bata. This leadership and these services were extended with exceptional effectiveness and ingenuity although Jan Bata was exposed to serious personal risks and subjected to acute personal humiliation.

So far as we know, no other substantial private prewar business of the many which were located in Czechoslovakia, and in the central European neighbor states of Poland, Hungary, Rumania, and Bulgaria, has survived the combined perils of war time occupation by the Nazis and postwar expropriation by the Communists. This is some measure by which to judge these services of Jan Bata.

A Partition for Compensation

One possible form of compensation would be an order partitioning certain of the Bata enterprises and Bata resources so that certain of the complete units would be vested in each side of the family.

Such a partition of the Bata enterprises, or a partition of the Leader shares and of the Westhold and North River shares would be practical as a method of equitable compensation.

With Jan's claim for compensation as now urged, based on his services only to the property in suit, the condition that he shall have access to the Delaware Court only if he submits his minority shares to its jurisdiction is unreasonable.

This is so onerous a condition as to deprive Jan of the right to prosecute his claim in the Delaware Court. It has changed his absolute right to proceed in the Delaware Court in the presentation of his claim for compensation to a conditional right to do so, and thus closed the doors of the Court, supposedly always open, on his claim.

Jan's Claim Not Premature.

Jan's claim is not premature. *Williams* v. *Gibbes*, *supra*.

That the condition imposed was beyond the state's power to impose, is shown by the fact that the state cannot extend its power outside its jurisdiction, either through its legislature, its executive, or its judiciary, through its power to regulate a business, its power to tax or any other power, including, we submit, its judicial power.

Allgeyer v. *Louisiana*, 165 U. S. 578 (1897);
Frick v. *Penna.*, 268 U. S. 473, 489, 491 (1925);
Baldwin v. *Seelig*, 294 U. S. 511, 521, 524 (1935);
U. S. v. *Curtiss Wright Export Corp.*, 299 U. S. 304, 318 (1936).

That his right cannot be so conditioned is demonstrated by other cases.

In *Frost Trucking Co.* v. *R.R. Com.*, 271 U. S. 583 (1926), where California sought to impose a condition on the use of its highways, which converted a private carrier into a common carrier, the United States Supreme Court held that such condition contravened the due process clause of the 14th Amendment, stating, at page 594:

> "• • • the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assualt, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. Having

regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

"It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

See also: *Washington-Southern Navigation Co.* v. *Baltimore & Philadelphia Steamboat Co.*, 263 U. S. 629 (1924);
Power Co. v. *Saunders*, 274 U. S. 490 (1927);
Dowd v. *Cook*, 340 U. S. 206 (1951);
Watson v. *Employers Liability Assn. Corp.*, 348 U. S. 66, 80-81 (1954).

The Right to Access to Courts

Access to the Delaware Courts should be a privilege of even higher standing than the privilege of using the highways; in fact it should be an absolute and unconditional right, and under the treaties between Brazil and the United States is such right. This right of Jan's cannot be conditioned on his giving up or the possibility of his giving up his minority shares in exchange for the right to seek just compensation at the hands of the Delaware Courts.

Neither the due process clause, nor the equal protection of laws clause can be violated by a state. And as stated in *Scott* v. *McNeal*, 154 U. S. 34 (1894), at page 45:

> "These prohibitions extend to all acts of the State, whether through its legislature, its executive or its judicial authorities."

See also: *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 680 (1930);
Shelley v. *Kraemer*, 334 U. S. 1, 14 (1948).

This was an *In Rem* proceeding to determine title to certain property and Jan's appearance in this, a foreign country to him, for the purpose of protecting his property already in the possession of the Court, may not be deemed a voluntary appearance, but a compulsory one.

See *Hilton* v. *Guyot*; *Par supra 6 C. J. S. Appearances, Sec.* 1, p. 4.

Being thus compelled to come in and defend his rights, while he should have all rights connected with the property in the Court's possession protected, he should not be required to put other property he owns or possesses within the jurisdiction of the Court, control over which it does not now have.

Alternatively, therefore, if this Court does not award the ownership of the shares in custody to Jan-Bata, his claim for compensation should be reinstated, without con-

dition, the stock in question should be held by the Court Receiver until the amount of his compensation is determined, and its delivery to plaintiffs should be withheld until payment of this compensation as awarded.

2 Restatement, Trusts (1935), sec. 345 (g).

VII. Newly Discovered Evidence of Czechoslovakian Law

Petitioner has served Notice of Motion for Reopening for presentation of newly discovered evidence.

Petitioner reemphasizes the first grounds under Section I, that there is no jurisdiction for collateral attack, and that the Czechoslovakian determination that the May 10th and May 19th documents were valid, is final.

Alternatively, if this court is to review the validity of the May 10th and May 19th documents, the newly discovered evidence has very great significance.

Expert evidence from competent authorities in Czechoslovakian law in the period 1931, 1932 and 1933 will be presented in support of the Motion.

The statement of the newly discovered evidence, if admitted on the motion will be a basis for the seventh ground for this petition for reargument.

Statement of Newly Discovered Evidence

The newly discovered evidence is as follows.

It was the law in Czechoslovakia in 1931, 1932 and 1933 that a unilateral declaration of sale addressed to an intended purchaser and placed in a position where it would be received by the intended purchaser after the death of the seller was a valid offer.

It was further the law in Czechoslovakia in 1931, 1932 and 1933 that an offer did not terminate upon the death of the offeror unless the offeror had expressed a contrary intention. Such an offer could be accepted validly within a reasonable time after death.

It was further the law in Czechoslovakia in 1931, 1932, and 1933 that when such an offer was accepted after death, the probate court had the jurisdiction and duty to supervise the fulfillment of the contract and to supervise and confirm the provision of the substitute estate or payments for distribution through the deed of delivery. The title to the property sold passed directly to the purchaser and did not vest in the other heirs.

It was the law in Czechoslovakia in 1931, 1932 and 1933 that the May 10th and May 19th documents in the instant case, upon the acceptance of the May 10th document by Jan A. Bata, did constitute a valid contract consummated after the death of Thomas Bata.

Documents and transactions of this kind were used for many generations in Czechoslovakia, and particularly in Moravia and Bohemia, for the purpose of passing on the ownership of the farms and the personal property on the farms by the peasants.

For many generations in Moravia there was a policy and determination to maintain a vigorous, successful peasant population. For this purpose the farms were not divided between heirs or relatives. Instead, one man was selected in each generation to own the farm and he was charged with making certain reasonable payments of cash or of farm produce to other heirs or relatives. Thus, the splitting up of farms into uneconomic units, and the burdening of farms with unmanageable debts, which affected adversely many other areas and peoples in Central Europe and the Near East, were avoided. This was a firm and deep tradition and custom which was followed from generation to generation and was sustained and confirmed by the law.

The regular method used was to leave a memorandum of sale to the one selected for owner and a memorandum of charges or payments to be paid by the purchaser to others of the relatives and heirs.

This method was followed for many generations. It was unique in this area of Europe. It predated the Aus

trian-Hungarian Empire. It survived as a local custom sustained by local law throughout the years of the Austrain-Hungarian Empire and was continued when Czechoslovakia regained its independence and sovereignty after World War I. It was in effect in 1931, 1932 and 1933.

It was different from the general law of Germany, Austria, Switzerland and France. And, of course, it was different from the Common Law and from the law of New York and Delaware. It was the controlling law at Thomas Bata's death.

This unique method of maintaining the single ownership of farms is explained by the following authorities:

"Legal and Economic Basis of the Reich's Hereditary Peasant Farm Law"

Eric Hans Kaden, Professor of Law in Ordinary, University of Geneva.

20 Iowa Law Review 350, at pages 357 and 362.

"Family Structure in Europe" by H. J. Habakkuk.

Journal of Economic History Volume 15 at Page 9.

The law to sustain this custom is described in the commentary by the eminent authority on Czechoslovakian law, Ernst Swoboda, in "Das Oesterreichische Allgemeine Burgerliche Gesetzbuch". He writes at page 12:

"This offer does not lose its validity and binding power by the death of the offeror. The heirs also may be bound by the offer. The offer is valid in such a case unless the offeror expressed the contrary in his offer, or when it would be evident from the circumstances that the offer should not bind the legal successors. The binding power of the offeror within the term of the validity and effectiveness of the offer makes it impossible to revoke it."

SUMMARY

Wherefore defendant-below appellant in summary of the grounds for his petition respectfully submits to the Court that the opinion of the Court is in error:

I. This Court is without jurisdiction for a collateral attack upon the *in rem* Czechoslovakian Probate Proceedings, Administration and Disposition of the Estate of Thomas Bata in 1932 and 1933. The instant opinion includes and is based upon a collateral attack and is therefore a nullity for lack of jurisdiction and should be reversed.

II. The Defendant-appellant as a citizen of Brazil has treaty rights. The instant opinion violates these treaty rights and violates the 14th Amendment of the Constitution of the United States. These treaties are the supreme law of the United States under Article VI of the Constitution of the United States. The treaty rights include the right to proper respect for the Dutch decision, and for the *in rem* rule, and for the protection of his property rights. The opinion should therefore be reversed.

III. Alternatively, the Dutch Supreme Court Decision, as an absolute minimum, is conclusive that the Dutch Bata Shares of the deceased Thomas Bata became the property of defendant below appellant, and therefore is conclusive of the defendant appellant's ownership and right to the 890 bearer shares of Leader A. G. rightly held by this Court to be in Bata Best at the time the majority shares of Bata Best were owned and held by Defendant Appellant.

IV. Alternatively, the 1942 agreements and representations of the plaintiffs in the transactions, arrangements, and documents related to plaintiffs representative W. W. Parry's mission to Jan Bata in Brazil, constitute an agreement or an estoppel of the plaintiffs requiring the return of the property in suit to Jan Bata, now that more than six months have passed since the end of the war and the other contingencies of the 1942 arrangements

not having occurred. The opinion of this Court should be reversed to effectuate this return.

V. Alternatively, the Dutch decision is controlling as a matter of Treaty rights and international law; and the merits of case require a holding of (1) a valid contract or, (2) a valid testamentary disposition to the defendant appellant, or (3) a constitutive recognition by the plaintiffs, or (4) a tacit waiver by the plaintiffs. Any one of these alternatives requires a reversal of the opinion.

VI. Alternatively, the defendant-appellant is entitled to compensation for his services in the enhancement of the property in suit, the value of these services should be determined and awarded as a matter of equity, the award may take the form of a partition of certain of the units and resources of the total Bata enterprises and properties, and the award should constitute a lien on the property in suit to be fulfilled as a prior condition to any release of the property in suit from the custody of the receiver in the Court below.

VII. Alternatively, the newly discovered evidence, if admitted by this court on motion, establishes the ownership of the shares in custody by Jan A. Bata under the Czechoslovakian law applicable in 1931, 1932 and 1933.

WHEREFORE defendant below, appellant respectively petitions this court for a reargument.

Respectfully submitted,

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